112-676

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 950.

WILLIAM H. STREEPER AND RHODA MURPHY, ADMINISTRATRIX OF EDMUND H. MURPHY, DECEASED, APPELLANTS,

vs.

THE VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 23, 1884

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 950.

WILLIAM H. STREEPER AND RHODA MURPHY, ADMINISTRATRIX OF EDMUND H. MURPHY, DECEASED, APPELLANTS,

vs.

THE VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Transcript on appeal from district court	1	1
Complaint	3	1
Exhibit A—Commission account	22	10
B—Attachment account	35	19
C—List of personal notes under consignment contract	38	21
D—List of guaranteed notes under consignment contract	40	22
Answer of Crockwell & Bassett	42	23
Murphy & Streeper	48	25
Trial	58	30
Judgment of non suit	60	31
Notice of appeal	62	32
Opinion of supreme court of Utah Territory on motion for rehearing	63	32
Judgment of supreme court, Utah Territory	70	35
Order of reference	71	35
Report of referee	72	36
Order for judgment	79	39
Exceptions to findings of referee	80	40
Judgment	87	43
Notice of motion for new trial	88	43
Statement of evidence and exceptions	89	44

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order overruling motion for new trial	91	45
Notice of appeal	92	45
Proceedings in supreme court, Utah Territory—		
Hearing	93	46
Judgment	94	46
Suggestion of death of Murphy, order of substitution and order allowing appeal	94	46
Supersedeas bond	96	46
Bond to clerk	98	48
Waiver of citation	99	49
Stipulation as to appeal	100	49
record and to submit case	101	49
Clerk's certificate	102	50
Assignment of errors	103	50

Transcript on Appeal.

1, 2 Supreme Court, Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff and Respondent,
vs.
GEO. W. CROCKWELL *et al.*, Defendants and Appellants.
} District Court. File No. 4099.

Filed October 31st, 1882.

E. T. SPRAGUE,
Clerk of Supreme Court.

3 *Complaint.*

In the District Court of the Third Judicial District of the Territory of Utah.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., WILLIAM W. STREEPER, DANIEL GRENIG, and EDMUND H. MURPHY, Defendants.
} No. 4099.

Now comes the plaintiff in the above-entitled action and complains of said defendants, and alleges:

That at the several dates hereinafter named said plaintiff was, and that at this date said plaintiff is, a corporate body, duly organized and existing under and by virtue of the laws of the State of Connecticut, and heretofore & now doing business in Chicago, Illinois, & in said Territory of Utah; and that at the several dates aforesaid, one L. C. Riggs, as the agent and attorney-in-fact thereof, was duly authorized, on the part of said plaintiff, to make and execute, and did on behalf of said plaintiff, and as the act and deed of said plaintiff on its part, duly make and execute the agreement hereinafter set forth, signing the same under the name, style,
4 and description of "Victor Sewing M. Co., L. C. Riggs, att'y."

That on the 28th day of June, 1875, said Victor Sewing Machine Company of the one part, and said defendants, George Wallace Crockwell and Charles Henry Bassett, Jr., of the other part, duly made, entered into, & executed a certain agreement bearing date this day & year last aforesaid; a copy of which said agreement now follows, & which agreement was in the words & figures following, to wit:

Agreement.

This agreement, made 28th day of June, eighteen hundred and seventy-five, between the Victor Sewing Machine Company, a cor-

poration duly established by law at Middletown, Connecticut, having a place and doing business in Chicago, Ill's, of the first part, as consignors, and G. W. Crockwell and C. H. Bassett, Jr., of Salt Lake City, county of Salt Lake, Ter. of Utah, of the second part, as consignees, witnesseth:

First. Said consignors will, upon the return of this contract, accompanied by a satisfactory bond, deliver at any railroad station or steamboat landing in the city of Chicago six or more Victor Sewing machines, marked to said consignee at Salt Lake City, and will thereafter, during the continuance of this contract, ship from time to time, upon the order of the consignee, such machines as in the judgment of the consignors may be necessary for the consignee to do a satisfactory business.

5 Second. That the consignee shall open a salesroom in Salt Lake City, and shall devote their entire time and best efforts to the introduction and sale of the "Victor" Sewing Machine; all said machines to be sold, if possible, for cash on delivery. All promissory notes taken shall be guaranteed by the consignee, and delivered to the consignors. The blank endorsement of said notes by said consignee, before delivery to said Victor Sewing Machine Company, shall be a guarantee of the payment of such notes, all notes taken to be made payable to the "Victor" Sewing Machine Company, at a bank or express office, and on not longer time than twelve months from date of sale.

Third. Said consignee shall sell all machines consigned under this agreement, and shall remit for the same, within four months from the date of shipment; and, upon failure to sell and remit unto said consignors, they, the said consignors, may, at THEIR OPTION, AND AT ANY TIME AFTER FOUR MONTHS FROM DATE OF SHIPMENT, charge said consignee with all machines that have been consigned four months, and that have not been satisfactorily settled for at the retail price of said machines, less forty per cent., and such amount or amounts shall be immediately due, and collectable on demand. Said consignee may terminate this contract, and return all machines that have been consigned *less* than four months, whenever he shall desire so to do, but shall pay freight on all said machines to Chicago, and amount necessary to make said machines new and salable.

6 Fourth. Said consignee shall report in writing, on blanks furnished by said consignors, each and every week, and as much oftener as may be required by the consignors, a full and accurate statement of machines on hand, with the plate number of each, and, also, a like statement of all machines, with the plate number of each, and the terms of sale. Said consignee shall remit the proceeds of such sales to the consignors each week.

Fifth. Said consignor will, upon receiving report and remittances from said consignee, examine into said remittance and report, and, if said sale or sales are approved, will credit said consignee as follows:

On all sales, when one-half of the retail price of said machines sold is remitted in cash, fifty per cent. of the retail price of said machines.

On all sales made on notes running not longer than six months from date of sale, forty-five per cent. of the retail price of said machines sold.

On all sales made on notes running longer than six, and not longer than nine, months from date of sale, forty per cent. of the retail [price] of said machines sold.

On all sales made on notes running longer than nine, and not longer than twelve, months from date of sale, thirty-five per cent. of the retail price of said machines sold.

And said consignee is to be charged with the difference between the amount or amounts remitted and the retail price of the machine or machines reported; and said consignee agrees to remit
7 such an amount as will equal the retail price of the machines reported sold (less the commissions above provided), together with five per cent. of the retail price of all machines sold for notes in addition thereto; and said five per cent. shall remain with said consignors until the termination of this contract, and the payment of all notes taken under or pursuant to the same, and after deducting from said five per cent. the cost of collecting said notes, if any there be, and the payment of any cost or expense attending the settlement of this contract, the said consignors will pay to the consignee such portion of the above-mentioned five per cent. reserve as shall at that time be due the said consignee.

Sixth. Said consignors will sell parts of their machines at a discount of forty (40) per cent. from list price, and attachments at the lowest wholesale rates, said parts and attachments to be settled for, with cash, every thirty days, unless otherwise mutually agreed, and in the event of giving time twenty (20) per cent. will be added to regular cash prices.

Seventh. Said consignors may revoke and terminate this contract, and take and repossess said machines, and other property in the hands and control or possession of said consignee, belonging to said consignors, whenever said consignors shall so elect, charging the consignee an amount sufficient to cover the loss of any machines, or damage thereto, from any cause whatever; the said consignee to have the right and privilege, however, to take such machines
8 at the retail price thereof (as if new), less forty per cent. But while said consignee shall continue said business and perform this contract to the reasonable satisfaction of said consignors, no other party shall be appointed agent for said consignors within the following territory, to wit: Utah, Salt Lake, Summit, Davis, and Tooele counties, in Utah Territory.

Eighth. And the consignee further agrees to pay to the consignors (2) two dollars per month for the use of each wagon furnished by the consignors.

It is further mutually agreed that the consignors may regulate the time on which notes taken may be drawn, reducing the same from twelve months (as provided in article seven) to nine months, and whenever said consignee shall receive such notice he will not thereafter be allowed to sell any machines on longer time than nine months, and, should the consignor desire, they may reduce the time

on which notes taken may be drawn to six months; but in the event of making the time shorter than nine months, thirty days written notice shall be given by the consignors. And the consignors reserve the right to shorten and lengthen the time on which notes may be taken as often as they desire, always giving the thirty days' notice before shortening from a longer time to six months.

It is further agreed by and between all parties hereto that said consignee may give his personal notes, on average six (6) months' *months* time, for such machines, as he shall dispose of during
9 each month, otherwise than for cash or note, at the retail price of said machines, less forty per cent.

And further, that the consignee may give his personal notes, on an average of nine (9) months' time, for such machines as he shall dispose of during such month, otherwise than note or case, at the retail price of said machines, less 35 per cent; but this later provision may be terminated at any time at the pleasure of the consignors, and again restored and terminated, and as often as the consignors may elect.

XX. All machines belonging to the said Victor Sewing Machine Company, and now in the possession or under the control of the said consignee, shall, at the option of the said consignors, be treated and regarded as delivered under this contract, and the provisions of this contract, and the provisions of this contract shall be applicable thereto.

Dated at Salt Lake City, and signed on the day and year first above written.

[Marginal clauses.] And it is further agreed by and between all parties hereto that the consignees have the privilege of an extension of time, not to exceed two months, added to the four months mentioned in Article 3, but the said extension shall [be] given only when requested by writing to consignors, before the expiration of the four months aforesaid, and only when necessary for con-
10 signors to class out such machines as they have on hand at time of writing.

And it is further agreed by and between the parties hereto that they will pay transportation on all wagons that may be furnished by consignors under this contract from Chicago to any point in Salt Lake, and upon the termination of this contract to return the same to the consignors at Chicago free of charge.

VICTOR SEWING M. CO.
L. C. RIGGS, *Att'y.*
GEORGE WALLACE CROCKWELL.
CHARLES HENRY BASSETT, JR.

The marginal clauses was made before signing.
GEO. WILKINSON.

I, G. W. Crockwell, and C. H. Bassett, Jr., having signed and read the above contract, hereby certify that I know the contents of the same, and fully realize that the property that shall be shipped under said contract is not now, nor ever will be, mine; and that I have no

interest in any portion of said sales except as provided in article five; and I also realize that the rendering of a false report, or the appropriation to my own use of any part of the proceeds of any sale I may make, except as provided in article five, constitutes a criminal offence against the State in which I reside.

G. W. CROCKWELL.
C. H. BASSETT, JR.

Signed in presence of—
GEO. WILKINSON.

11 That on the 3d day of July, 1875, the said defendants, who are made parties to this action on the back of said agreement, and under their hands and seals, and under their proper names aforesaid, (with the exception of the signature of William H. Streeper, who signed the same under the ab-reviation, name and style of Wm. H. Streeper,) duly made and executed their certain bond to said plaintiff, bearing date the day and year last aforesaid, a copy of which said bond now follows, and which said bond was in the words and figures following; to wit:

Bond.

Know all men by these presents, that we, George Wallace Crockwell and Charles Henry Bassett, Jr., as principals, and Wm. H. Streeper, of Centreville, Davis co.; Daniel Grenig, of Salt Lake City; and Edmund H. Murphy, of Salt Lake, are held and firmly bound unto the Victor Sewing Machine Company, a corporation duly chartered under the laws of the State of Connecticut, and situated at Middletown, Connecticut, having a place and doing business in Chicago, Ill's, in the sum of three thousand dollars, lawful money of the United States, to be paid to the said Victor Sewing Machine Company, their representatives, or assigns, for which payment, well and truly to be made, we bind ourselves, jointly and severally, and the heirs, executors, and administrators of us, and each of us, firmly by these presents, without any relief from valuation, appraisement, or stay laws.

12 Sealed with our seals, signed, and dated this third day of July, 1875.

The condition of this obligation is such, that if the above bounden, George Wallace Crockwell and Charles Henry Bassett, Jr., shall pay unto said Victor Sewing Machine Company all moneys due, or which shall become due, said Victor Sewing Machine Company, under or pursuant to the within contract, or which shall arise therefrom, whether by book accounts, notes, renewals, or extention of notes or accounts, acceptances, endorsements, or otherwise, hereby waiving presentment for payment, notice of nonpayment, protest or notice of protest, and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed, assigned, and shall well and truly keep and perform, in all respects, according to its true intent and meaning, the contract or agreement to which this obligation is attached, executed between the said Victor Sewing Machine Com-

pany and G. W. Crockwell and C. H. Bassett, Jr., dated at Salt Lake City, the 28th day of June, 1875, then this obligation to be void; otherwise to remain in full force and virtue.

But said contract may be varied or modified by the mutual agreement of said Sewing Machine Company and said G. W. Crockwell and C. H. Bassett, Jr., as to the manner of carrying on said
13 business, or as to the time on which notes taken shall be drawn, or as to the compensation to be paid to said G. W. Crockwell and C. H. Bassett, Jr., or as to the period at which said G. W. Crockwell and C. H. Bassett, Jr., shall report, and said company, for the machines they may sell, or as to the Territory on which said machines shall be shipped or sold, or as to the place from which said machines shall be shipped, and such changes and modifications or variations shall in nowise affect or impair our liability on this bond.

GEORGE WALLACE CROCKWELL. [SEAL.]
CHARLES HENRY BASSETT, JR. [SEAL.]
WM. H. STREEPER. [SEAL.]
DANIEL GRENIG. [SEAL.]
EDMUND H. MURPHY. [SEAL.]

GEO. WILKINSON.
CHAS. H. BASSETT.
JAS. D. McCURDY.
J. D. M. CROCKWELL.
A. W. PAUL.

That thereupon the said defendants, the said Crockwell & Bassett, delivered said agreement, and said defendants, Crockwell & Bassett, Streeper, Grenig, and Murphy, delivered said bond to said plaintiff.

That the said agreement, a copy of which is hereinbefore given, was and is the same agreement referred to in said bond. Plaintiff, on its information and belief, alleges that said plaintiff duly performed all the matters, things, and conditions resting or obligatory upon it to do or perform under or by reason of the agreement aforesaid.

On its information and belief, said plaintiff alleges that the
14 condition of said bond was broken by said defendants, and said defendants failed to keep and perform the conditions of said bond; that said Crockwell & Bassett should well and truly keep and perform the said agreement in this, to wit: That in and by the 5th article or subdivision of said agreement said Crockwell & Bassett, called therein the consignees, were each week to report to said plaintiff, called therein the consignor, all the sewing machines furnished by said plaintiff and sold by said Crockwell & Bassett, and remit the proceeds of such sales to said plaintiff; whereupon said plaintiff was to credit said Crockwell & Bassett, as therein specified, and said Crockwell & Bassett were to be charged the difference between the amounts remitted and the retail price of the machine or machines reported, said Crockwell & Bassett therein agreeing to remit to plaintiff such an amount as would equal the retail price of

the machines reported sold, (less the commissions therein provided,) together with five per cent. of the retail price of all machines sold for notes in addition thereto, said five per cent. to remain with said plaintiff until the termination of said contract or agreement, and the payment of all notes taken under or pursuant to the same, and after deducting from said five per cent. the cost of collecting the notes therein mentioned, if any there were, and the payment of any cost and expense of the settlement of that agreement, the said plaintiff were to pay to said Crockwell & Bassett such portion of the above-mentioned five per cent. reserve as should at that time be due to the said Crockwell & Bassett.

That between the dates of July 3d, 1875, and February 10th,
15 1876, said plaintiff at the request of said Crockwell & Bassett, consigned and delivered to said Crockwell & Bassett, under and in pursuance of said agreement, divers sewing machines, which were by said Crockwell & Bassett, prior to the year 1878, sold by said Crockwell & Bassett; but said Crockwell & Bassett failed and refused, and still do fail and refuse, to remit or pay to said plaintiff the proceeds of sales, or so much thereof as said plaintiff hath been and is entitled to under said article or subdivision five of said agreement to plaintiff's damage in the sum of $\$146\frac{82}{100}$; that the said several sums of money, which the said Crockwell & Bassett have so failed and refused to remit or to pay over, amount, in the aggregate, to the sum of $\$146\frac{82}{100}$, a detailed and itemized [account] of which said sales, showing the machines received from plaintiffs and sold by said Crockwell & Bassett, and the amounts remitted with the proper credits thereon, and the amounts due & not remitted, as well as the balance due thereon, now due plaintiff, is hereto attached, marked Exhibit "A," and made a part of this complaint.

On its information and belief, plaintiff alleges that the conditions of said bond were broken by said defendants, and said defendants failed to keep and perform the conditions of said bond; that said Crockwell & Bassett should pay plaintiffs all the moneys due, or to become due, plaintiff under persuant to said agreement, and should well and truly keep & perform said agreement in this, to wit, that said plaintiff, between the dates of July 3d, 1875, and February,
1876, under and [in] pursuance of article or subdivision six
16 of said agreement, at the request of said Crockwell & Bassett, consigned & delivered to said Crockwell & Bassett good-, wares, & merchandise, being parts of machines and all attachments for machines of plaintiff, at a discount of 40 per cent. from list prices for parts of machines, and at the lowest wholesale rates for such attachments, to be settled for in cash by said Crockwell & Bassett every thirty days, unless otherwise mutually agreed between them & plaintiff, and when time was given by plaintiff for such settlement 20 per cent. was to [be] added to the regular cost prices. But the said Crockwell & Bassett as to much of the said goods, wares, & merchandise failed & refused to settle for the same, with cost, in 30 days, and still fail & refuse to settle for the same with plaintiff for cost, or to pay for the same, and as to such goods, wares, & merchandise said Crockwell & Bassett have failed & refused to comply

with the said terms specified in said article or subdivision six, to plaintiff's damage in the sum of $87\frac{97}{100}$; that the said several sums of money which the said Crockwell & Bassett were by said article or subdivision 6 of said agreement required to pay to said plaintiff amounts, in the aggregate, to the sum of $87\frac{97}{100}$, a detailed and itemized account showing the parts of machines & attachments so furnished Crockwell & Bassett and the amounts paid plaintiff therefor, and showing the amounts which should have been, but were not, paid plaintiff by defendants Crockwell & Bassett, with the balance now due plaintiff by Crockwell & Bassett, is hereto attached, marked Exhibit B, and made a part of this complaint.

On its information and belief, plaintiff alleges that the conditions of said bond were broken by said defendants, and said de-
17 fendants failed to keep or perform the conditions of said bond that the said Crockwell & Bassett should pay to plaintiff all moneys due, or which should become due, to said plaintiff, under or pursuant to said agreement, or which should arise therefrom; and that said Crockwell & Bassett should well and truly keep and perform said agreement, in this, to wit: That said plaintiff between the dates of July 3d, 1875, and February, 1876, under and in pursuance of said contract or agreement and said bond, at the request and order of said Crockwell & Bassett, consigned and delivered to said Crockwell and Bassett, goods, wares, and merchandise, to wit, divers sewing machines of great value, which were by the said Crockwell & Bassett, after the said 3d day of July, 1875, and prior to April, 1876, sold by said Crockwell & Bassett. That under and in pursuance of said bond, and of the 4th and 5th clauses or subdivision 8 of said agreement said Crockwell & Bassett from time to time and between the dates last aforesaid gave to said plaintiff their personal promissory notes or promises to pay for the price of such machines, and as evidencing their indebtedness to said corporation for such machines and at and according to the rates for such machines mentioned in said agreement, a list and description of said notes is herewith filed marked Exhibit C, and made a part of this complaint; such list showing, under the head of date, the date of each of said notes by giving, first, the number of the month of the year, counting Jan-
uary as one; next, the day of the month by number, and,
18 next, the year, by abbreviation, such as '75 or '76 for 1875 or 1876, as the case may be. Said Exhibit C also shows when said several notes became due and payable, in like manner, under the heading of due; also the number or folio of each of said notes under the heading of No. or folio; also, the makers of each of said notes under the heading of name, the name being given or dots thereunder to indicate the named, also the party to whom payable, under the heading of "with," giving the name of plaintiff under the name, style & description of "Victor S. M. Co.," or by dots thereunder indicating the same named; also, giving, under the heading of "amount," the amount of each of said notes, or the balance due thereon exclusive of interest; that said notes or evidences of indebtedness amount in the aggregate to the sum of $1.766\frac{10}{100}$ principal, exclusive of interest, and all moneys, fees, and that the interest

thereon amounts to, $609\frac{93}{100}$, all of which, together with the attorney's fees for collection hereinafter named and now due said plaintiff by said Crockwell & Bassett, and still unpaid. But said Crockwell & Bassett, in violation of said article 8 of said agreement, and also of said bond, have failed and refused to pay, and still do fail ond refuse to pay, for such machines so sold by them, or to pay to said plaintiff said promissory notes or any of them or any part thereof, and said defendants have failed and refused to pay indebtedness of principal $1,766\frac{10}{100}$, or interest, $609\frac{93}{100}$, or of attor-
19 ney's fees for collection $237\frac{69}{100}$ to *to* the damage of said plaintiff in the sum of $2613\frac{63}{100}$. Said promissory notes are, by said plaintiff, brought into court to abide the order and disposition of said court.

On its information and belief, plaintiff alleges that the conditions of said bond were broken by said defendants, and said defendants failed to keep and perform the conditions of said bond, that the said Crockwell & Bassett should pay to plaintiff all moneys due, or which should become due, to plaintiff under or pursuant to said agreement, or which should arise therefrom; and that said Crockwell & Bassett should well and truly keep and perform said agreement, in this, to wit: That between the dates of July 3d, 1875, and February 10th, 1876, said plaintiff, under and in pursuance of said bond & agreement, and at the request of said Crockwell & Bassett, consigned & delivered to said Crockwell & Bassett at Salt Lake City, Utah, divers sewing machines, which prior to said last-named date were sold by said Crockwell & Bassett to divers persons, and the promissory notes, or promises to pay of such renders were by said Crockwell & Bassett taken payable to the order of plaintiff, & duly made & executed by said renders, & delivered by them to Crockwell & Bassett, who endorsed & guaranteed the same, & delivered the same to plaintiff. That under & in pursuance of said bond and agreement, and of article or subdivision second, of said agreement,
20 said promissory notes or evidence of indebtedness were so procured of said renders and endorsed, & the payment thereof guaranteed by said Crockwell & Bassett to plaintiff; a list and description of said promissory notes is herewith filed marked Exhibit D, and made a part of this complaint—in which exhibit the dates of each of said notes, the time when the same become due, the No. or folio of each of said notes, and the amounts thereof, are given in the same manner as in the said list in said Exhibit C.

That the principal of such notes amount in the aggregate to the sum of $358\frac{83}{100}$. But said makers of said guaranteed notes have refused & still do refuse to pay, & said Crockwell & Bassett, in violation of said article second, of said agreement, and also of said bond, have failed & refused to pay said promissory notes so guaranteed as aforesaid, or any of them, or any part of any of them, of all of which said Crockwell & Bassett had due notice; that such guaranteed notes are past due, still unpaid and due, and owing, from Crockwell & Bassett and the makers thereof to plaintiff; and the defendants herein have failed & refused, and still do fail and refuse, to pay or cause said Crockwell & Bassett or maker of said guaranteed notes to

pay, said guaranteed notes or any part of any of such notes, to plaintiff's damage in the sum of $358 $\frac{83}{100}$.

21 Wherefore plaintiff demands judgment against said defendants for the sum of $3,000.00, the amount named in said bond & costs of suit, with such other relief as may be just.

MARSHALL & ROYLE,
Attorneys for Plaintiff.

TERRITORY OF UTAH,
County of Salt Lake, } ss:

Jonathan C. Royle, having been first duly sworn upon his oath, says:

I am one of the attorneys for said plaintiff in the above-entitled action; I have read the foregoing complaint, and know the contents thereof, and that it is true of my own knowledge, except as to those matters therein stated on information & belief, and as to those matters I believe it to be true. My knowledge, information, & belief derived from information professionally imparted to me by plaintiff, and from having in my possession the original agreement & bond named in said complaint, and the said exhibits, and said personal notes of Crockwell & Bassett, and some of said guaranteed notes. The reason this verification is not made by said corporation or an officer thereof, is because there is no officer of said plaintiff in said county of Salt Lake, which is the county where I reside.

JNOTHAN C. ROYLE.

Subscribed and sworn to before me, this 12th day of June, 1879.

J. A. MARSHALL,
Notary Public.

22 EXHIBIT "A."

Crockwell & Bassett, Salt Lake City, in account with Victor Sewing Machine Company.

Commission Acc't.

1875.			DR.	CR.
Aug. 21.	Sale reported—			
	1 D. L., 2 drs., No. 85292		$75 00	
	Rec'd notes O. Oleson 3, 6, 9, & 12 mo., $20.00 each	$80 00		
	3 D. L. & 2 drs, $75.00		225 00	
	1 D. L. 2 drs., ½ pearled		80 00	
	3 Pat. F. C., $85.00		255 00	
			635 00	
	Nos. 85290, 85290, 82015, 85296, 85992, 85293, 85300:			
	Rec'd their notes dated —			
	8-14-7, @ 6 mos.	$109 80		
	" 9 "	109 80		
	" 12 "	109 80		
	C. & B. retained			
	By com. 35 per cent. on	635 00		$225 50
				$222 25

1875.					Dr.	Cr.
Aug. 27.	Sale reported—					
	1 D. L. 2 drs., No. 85289			$75 00		
	Rec'd their notes 8-21-75, 6, 9, 12 months, 16.25 each		$48 75			
	C. & B. retained		26 25		$26 25	
	By com'n 35 per cent. on		75 00			$26 25
Sept. 7.	Sale reported—					
	1 covered No. 85299			70 00		
	1 P. F. C. 85297			85 00		
				155 00		
	Rec'd their notes dated—					
	8-28-75, @ 6 mos.		33 50			
	" " 9 "		33 50			
	" " 12 "		33 50			
	C. & B. retained		54 25		54 25	
	By com. 35 per cent. on		155 00			54 25
23					306 00	302 75
	Forward				306 00	302 75
Sept. 14.	Sale reported—					
	1 D. L. 2 drs., No. 86670			75 00		
	Rec'd their notes dated—					
	9-14-75 @ 6 mos.		16 25			
	" " 9 "		16 25			
	" " 12 "		16 25			
	C. & B. retained		26 25		26 25	
	By com. 35 per cent. on		75 00			26 25
17.	Sale reported—					
	1 Pat. F. C.			85 00		
	2 D. L., 2 drs. with U. B.			160 00		
	1 " "			75 00		
				320 00		
	Rec'd their notes dated—					
	9-11-75 @ 6 mos.		23 40			
	" 9 "		23 40			
	" 2 "		23 40			
	" 3 "		20 00			
	R. Kelley, 9-9-75, 6 mos.		20 00			
	9 "		20 00			
	12 "		20 00			
	G. W. Williams, 9-1-75, 3 mos.		20 00			
	12-1-75, 3 "		15 00			
	9-1-75, 12 "		22 75			
	C. & B. retained		112 00		112 00	
			320 00			
	By com'n 35 per cent. on 165.00			57 75		
	" " 75.00			26 25		
	" " 80.00			28 00		
23	Sale reported—					112 00
	1 D. L. 2 drs., No. 85294			75 00		
	Rec'd note R. Belnap dated—					
	8-16-75 @ 3 mos.		20 00			
	" " 12		30 00			
	C. & B. retained		25 00		25 00	
	By com. 35 per cent. on		75 00			26 25
	Forward				469 25	467 25

24

C. & B. Com'n.

1875.

					Dr.	Cr.
		Forward			$469 25	$467 25
Sept.	30.	Sale reported—				
		6 D. L. 2 drs. 75		$450 00		
		1 Cove'd		70 00		
		1 Pat. F. C		85 00		
				605 00		
		Nos. 86666, 86486, 86669, 86497, 668, 496, 493, 495, rec'd their notes dated 9-25-75—				
		6 mos	$164 40			
		9 "	164 40			
		12 "	164 45			
		C. & B. retained	111 75		111 75	
		By com. 35 per cent. on	605 00			211 75
Oct.	12.	Sale reported—				
		1 Pat. F. C. 86485		85 00		
		2 D. L. 2 drs. 86488, 85298		150 00		
				235 00		
		Rec'd notes L. Hatch 9-25-75—6 mos	35 00			
		12 "	35 00			
		C. W. Fairbanks 9-29-75— 6 mos	30 00			
		12 "	30 00			
		Their notes— 6 mos	7 50			
		9 "	7 50			
		12 "	7 50			
		C. & B. retained	82 25		82 25	
		By com. 35 per cent. on	235 00			82 25
	15.	Sale reported—				
		1 Pat. F. C		85 00		
		1 D. L. 2 drs		75 00		
				160 00		
		No. 86492-864.87 rec'd their notes dated 10-9-75	4 00			
		C. & B. retained	156 00		156 00	
		By Com. 35 per cent. on	160 00			56 00
		Forward			819 25	817 25
25						
		Forward			819 25	817 25
Oct.	23.	Sale reported—				
		1 pat. F. C., 86490		85 00		
		1 D. L., 2 dr's, 86498		75 00		
				160 00		
		Rec'd their notes dated 10-16-75—				
		1 mo	42 50			
		6 "	16 25			
		9 "	16 25			
		12 "	16 25			
		C. & B. retained	68 75			
			160 00			

C. & B. Com'n.

1875.					Dr.	Cr.
Oct.	23.	By com., 45 per cent. on 85.00		$38 25		
		" " 35 per cent. on 75.00		26 25		$64 50
	30	Sale reported—				
		1 pat. F. C., 87803		85 00		
		1 D. L., 2 dr's, 87622		75 00		
		1 covered, 86489		70 00		
				230 00		
		Rec'd notes—				
		Jas. Bruntage, 10-18-75, 3 mo.		20 00		
		" 6 mo.		20 00		
		9 mo.		20 00		
		12 mo.		20 00		
		F. A. Curtis, 10-21-75, 12 mo.		20 00		
		" " 6 mo.		25 00		
		" " 9 mo.		20 00		
		Crockwell & B., 10-23-75, 9 mo.		45 00		
		" " retained		80 50	$80 50	
		By com., 35 per cent. on		230 00		80 50
		To rent of 1 wagon from Oct. 7, at 2.00 per month			1 45	
Nov	6.	Sale reported—				
		2 D. L., 2 drs., 82001, 82040		150 00		
		Rec'd their notes dated 10-30-75—				
		At 6 mos	32 50			
		9 mos	32 50			
		12 mos	32 50			
		C. & B. retained	52 50		52 50	
		35 per cent. on	150 00			52 50
		Forward			1022 45	1014 75
26						
		Forward			1022 45	1014 75
Nov.	13.	To collection charges on note, Oleson			25	
		Sale reported—				
		1 D. L., 2 drs., 82039		75 00		
		Rec'd note J. Stratton, 11-5-75—				
		6 mos	25 00			
		9 mos	25 00			
		12 mos	20 00			
		C. & B. retained	5 00		5 00	
		35 per cent. on	75 00			26 25
	22.	To collection charges on note Belknop, No. 4762			25	
	23.	To collection charges on note Crockwell & Bassett, No. 4775			25	
	22.	Sale reported—				
		4 D. L., 2 drs., 75.00, Nos. 47862, 88414, 87805, 87620		300 00		
		Rec'd notes L. D. Rodeback, 11-12-75—				
		6 mos	25 00			
		9 mos	25 00			
		12 mos	25 00			
		J. Chambertain, 6 mos	25 00			
		" 9 mos	20 00			
		" 12 mos	25 00			

C. & B. Com'n.

1875					Dr.	Cr.
Nov. 22.	Crockwell & B., 6 mos.		$16 50			
	9 mos.		16 50			
	12 mos.		17 00			
	" " retained		105 00		$105 00	
	By com., 35 per cent. on		300 00			$105 00
	Forward				1133 20	1146 00
27						
Nov. 29.	Forward				1,133 20	1,146 00
	Sale reported—					
	2 D. L., 2 drs., Nos. 88417, 82002			150 00		
	1 " " ½ pearled No. 59894			80 00		
	1 pat. F. C., 87621			85 00		
				315 00		
	Received notes—					
	J. A. Amtoft, 11–25–75, 12 mos.		40 00			
	10 "		35 00			
	Wm. Hull, 12 "		40 00			
	Crockwell & B., 6 "		29 75			
	" 9 "		29 75			
	" 12 "		30 25			
	" retained		110 25		110 25	
	By com'n, 35 per cent., on		315 00			
30.	To rent of wagon for November,					110 25
Dec. 6.	Sale reported—				3 00	
	1 D. L., 2 drs., 87618			75 00		
	Rec'd notes—					
	Crockwell & B., 11–27–75, 6 mos.		16 25			
	" 9 "		16 25			
	" 12 "		16 25			
	" retained		26 25		26 25	
	By com'n, 35 per cent., on		75 00			
13.	To collection charges—					26 25
	Williams note, No. 4858				25	
	Sale reported—					
	2 D. L., 2 drs., Nos. 88415, 87861			150 00		
	Rec'd notes—					
	W. W. Dayton, 11–12–75, 9 mos.		25 00			
	A. F. " " 12 "		25 00			
	" " " 6 "		15 00			
	" " " 9 "		15 00			
	" " " 12 "		15 00			
	Crockwell & Bassett, 12–4–75		2 50			
			97 50			
	Forward				1,272 95	1,282 50
28						
	Forward		97 00		1,272 95	1,282 50
	Crockwell & Bassett, ret.		52 50		52 50	
	By com'n, 35 per cent., on		150 00			52 50
Dec.	Sale reported—					
	4 D. L., 2 drs.			300 00		
	1 cov'rd			70 00		
	1 pat. F. O.			85 00		
	1 D. L., 4 drs., consig'd at 80.00			75 00		
				530 00		

C. & B. Com'n.

1876					
Dec.				Dr.	
	Nos. 88752, 88418, 88174, 87808, 88781, 88777, 88416:				
	Z. Martin, 12–8–75 --	3 mos--	$20 00		
		6 " --	20 00		
		9 " --	20 00		
		12 " --	20 00		
	J. Peterson, 12–6–75	6 " --	25 00		
		9 " --	25 00		
		12 " --	20 00		
	J. Jasperson, 12–14–75	4 " --	25 00		
		8 " --	25 00		
	E. Thomas, 12–15–75	6 " --	25 00		
		9 " --	25 00		
		12 " --	25 00		
	B. Sheen, 12–10–75, 10 " --		45 00		
	Crockwell & B., 12–18–75, 6 mos.		9 25		
	" " 9 "		9 25		
	" " 12 "		9 25		
	" retained		187 25	$187 25	
			535 00		
	By com'n, 35 per cent., 350.00			$187 50	
	" " " 5.00			1 75	
23.	To collection charges on note No. 4859, Kelly				$187 25
31.	For rent of wagon for December,		2 00	25	
	Overcharge in Nov.		1 00		1 00
	Forward			1,513 95	1,522 25
29					
	Forward			1,513 95	1,522 25
Jan'y 10	Sale reported—				
	1 D. L., 2 drs., 88178			75 00	
	1 Pat. F. C., 88778			85 00	
	Rec'd notes—				
	Crockwell & B., 1–1–76—6 mos.		35 00		
	" " 9 "		34 00		
	" " 12 "		35 00		
	" retained		56 00	56 00	
			160 00		
	By Com. 35 per cent. on				56 00
24	Sales reported—				
	3 D. L., 2 drs., 75.00			225 00	
	Nos. 88175–88780–88779.				
	Rec'd notes—				
	J. A. Senzie, 12–31–75—4 mos		15 00		
	I. L. Dutton, 1–15–76—6 mos		25 00		
	" " 9 "		25 00		
	" " 12 "		25 00		
	F. S. Ferris " 6 "		25 00		
	" " 9 "		20 00		
	" " 12 "		25 00		
	J. J. Loveless " 9 "		40 00		
	" " 12 "		35 00		
			235 00		
	Am't of m'd'se sold			225 00	
	Credit by def			10 00	
	By com., 35 per cent. on $225.00				10 00
31	Sale reported—				78 75
	2 D. L., 4 drs., 87619, 88177			160 00	
	1 " 2 " 87807			75 00	
				235 00	

C. & B. Com'n.

1876.				Dr.	Cr.
Jan'y 31.	Received note—				
	A. M. Kerr, 1-18-76	$71 75			
	Crockwell & B., retained	163 25		$163 25	
	By com., 35 per cent. on	235 00			$82 25
	Forward			1,733 20	1,749 25
30					
	Forward			1,733 20	1,749 25
Jan'y 31	To rent of 1 wagon for Jan'y	2 00			
Feb'y 7	Sale reported—				
	1 covered, 82407	70 00			
	1 Pat. F. C., 88413	85 00			
	1 D. L., 4 drs., 88412	80 00			
		235 00			
	Rec'd notes—				
	T. C. Banks, 1-24-76—12 mos		$50 00		
	L. Elmer, 1-26-76—6 "		20 00		
	" " 9 "		30 00		
	" " 15 "		20 00		
	J. M. Ballenger, 1-29-76—6 mos.		20 00		
	" " 9 "		10 00		
	" " 15 "		20 00		
	Crockwell & B. retained		65 00	65 00	
	By com'n, 35 per cent. on		235 00		82 25
16	To collection charges on note No. 5567, Oleson			25	
14	Sale reported—				
	1 D. L., 2 drs., 87804		75 00		
	Rec'd notes—				
	Crockwell & B., 2-5-76—6 mos.		16 25		
	" " 9 "		16 25		
	" " 12 "		16 25		
	" retained		26 25	26 25	
	By com., 35 per cent. on		75 00		26 25
	Forward			1,826 70	1,857 75
31					
	Forward			1,826 70	1,857 75
	Sale reported—				
	1 D. L., 2 drs., 88179		75 00		
	1 F. C., full-pearled, 85805		135 00		
			210 00		
	Received notes—				
	Crockwell & B., 2-19-76, 6 mos.		45 50		
	" " 9 "		45 50		
	" " 12 "		45 50		
	" retained		73 50	73 50	
	By com., 35 per cent., on		210 00		73 50
28.	To rent of 1 wagon for Feb'y			2 00	
Mch. 1.	Sale reported—				
	1 D. L., 2 drs., 88176		75 00		
	Rec'd notes—				
	Crockwell & B., 2-26-76, 6 mos.		16 25		
	" " 9 "		16 25		
	" " 12 "		12 25		
	" retained		26 25	26 25	
	By com., 35 per cent. on		75 00		26 25

C. & B. Com'n.

1876.				Dr.	Cr.
Mch. 17.	Sale reported—				
	1 full-pearled plain Cab't, No. 86723		$125 00		
	Rec'd notes—				
	B. Morris, 3 mos		23 75		
	" 11–76, 6 mos		23 75		
	" 9 "		23 75		
	" 12 "		23 75		
	Crockwell & B., retained		30 00	$30 00	
	By com. 35 per cent., on		125 00		$43 75
	To collection charges on note No. 6089, Keely			25	
	Forward			1,958 70	2,001 25
32					
	Forward			1,958 70	2,001 25
	Sale reported—				
Mch. 24.	1 pat. F. C., 87,806		85 00		
	Rec'd notes—				
	Crockwell & B., 3–18–76, 6 mos.		18 40		
	" 9 "		18 45		
	" 12 "		18 40		
	" retained		29 75	29 75	
	By com'n, 35 per cent. on		85 00		29 75
31.	To rent of 1 wagon for March			2 00	
May 16.	To collection charges on No. 7049, note Oleson			25	
10.	To notes, B. Morris—				
	No. 7657, dated 3–11–76, 3 mos.		23 75		
	" 9150, " 6 "		23 75		
	" 10559, " 9 "		23 75		
	" 414, " 12 "		23 75	95 00	
	Returned to Crockwell & Bassett.				
May 29.	To collection charges—				
	On note No. 7096, Chamberlain			25	
	" " 7614, Peterson }			50	
	" " 7547, Kelly, }				
	Forward			2,086 45	2,031 00
33					
	Forward			2,086 45	2,031 00
July 17.	Crockwell & Bassett report that machine 1 full-pearled plain cabinet No. 86723 has been taken back; we now credit each the notes that were sent there and charged to their account.		125 00		
	B. Morris, 3–11–76—3 mos	$23 75			
	6 "	23 75			
	9 "	23 75			
	12 "	23 75			95 00
	and charge their back amount of commission credited them. We also reconsign to them the machine 1 full-pearled plain cabinet No. 86723		125 00	43 75	
Sept. 14.	Sale reported—				
	1 L. D. 2 drs., No. 82409		75 00		

C. & B. Com'n.

1876			Dr.	Cr.
Sept. 14.	Rec'd notes—			
	Crockwell & B. 9-9-76—9 mo.	$49 50		
	" retained	25 50	$25 50	
	By com., 35 per cent. on	75 00		$26 25
4.	To collection charges—			
	On note No. 8566 Chamberlain		25	
15.	" " 9010 Kelly		25	
Oct. 27.	" " 9100 Thomas		25	
31.	" " 9593 Dalton		25	
Nov. 2.	" " 9764 Backhouse		25	
8.	" " 8522 Belknop		25	
13.	" " 10045 Palil		25	
	Forward		2,157 45	2,152 25
34				
	Forward		2157 45	2152 25
Dec. 21	To collection charges on note No. 10,526, Thomas		25	
1877.				
Jan'y 8.	To collection charges—			
	On note No. 7615, Martin		2 00	
	" " 10522, "		25	
18	" " 24, Dalton		25	
Feb'y 17	" " 6129, Fairbanks		2 61	
26	To 1 plain cabinet, full-pearled, No. 86723, consigned to him July 17, '76.			
	On consignment over four months.		125 00	
	By com. 40 per cent. 125.00			50 00
M'c'h 26	To collection charges—			
	On note No. 448, Parker		26	
May 17	" " Nos. 6586, 8062, & 9538, Curtis		5 00	
July 14	On note No. 32, Kerr, (part)		3 50	
	Balance			94 32
			2296 57	2296 57

Addenda.

1879.	Balance	94 32
May 23	To collection charges on notes No. 6128, Lewis Hatch	6 00
	No. 9538, F. A. Curtis, balance	3 50
	" 7084, 8555, 10015, Jas. Stratton	12 00
	" 8595, 10062, W. Dayton	11 00
	" 6614, Yau Jasperson	2 50
	" 8112, 9609, 124, L. Elmer	13 00
	" 9098, P. Peterson	4 50
	Balance due Victor S. M. Co.	146 82

35

EXHIBIT "B."

Crockwell & Bassett, Salt Lake City, in account with Victor Sewing Machine Company.

Attachment Acc't.

1875			DR.	CR.
			$ c.	$ c.
July 27	1 trade mark cut		75	
Aug. 13	150 needles	$3 75		
	2 trade mark cuts	1 50	5 25	
19	6, 9 tuckers	3 00		
	6 G. & B. tuckers	3 00		
	12 sets pat. hemmers	2 00		
	6 J. rufflers	5 00		
	6 Grust "	5 00		
	6 corders (N.)	2 00		
	6 " (U.)	2 00		
	36 small oil	2 70		
	6 several castors	3 00		
	1 quart oil can	1 00	28 70	
27	12 Spooler rubbers	30		
	12 oil cans	1 00	1 30	
Sept. 8	6 pair castors	1 50		
	6 binders	2 00	3 50	
9	By cash			$ 75
7	By overcharge—			
	Grust ruffler, Aug. 19th, charged at	5 00		
	Their claim should be	4 00		
	Credit them	1 00		1 00
13	1 shuttle	75		
	1 spooler complete	75	1 50	
21	Allowed them express charges per their letter Sept. 15, '75			1 28
	Forward		41 00	3 03

36

	Forward		41 00	3 03
Sept. 22	6 G. tuckers	3 00		
	6 J. rufflers	5 00		
	6 N. corders	2 00		
	24 small oil	1 80		
	2 treadles	90		
27	Tension, reg. sc. nut		12 70	
29	6 G. tuckers	3 00	06	
	3 corders	1 00		
	3 J. ft. rufflers	2 50		
	12 small oil	90		
			7 40	
Oct. 2	1 shuttle	1 25		
	1 " cradle	75		
		2 00		
	40 per cent	80		
			1 20	

C. & B. Attach.

				Dr.	Cr.
		12 pelmons		$1 80	
		6 set G. P. hemmers		1 50	
	25	Needle set screw		06	
Nov.	5	1 stand	$6 00		
		1 belt & hook	30		
				6 30	
	8	1 tenfion, reg. sc. nut		06	
Dec.	28	1 shuttle	75		
		1 presser ft. screw	06		
				81	
		1 G. & B. tucker	1 25		
		3 J. rufflers	2 38		
		3 set G. P. hemmers	75		
		3 corders	1 00		
		12 thread cutters	1 50		
				6 88	
		Forward		79 77	$3 03
37					
1875					
		Forward		79 77	3 03
Dec.	28	1 balance wheel	1 00		
		6 rubber washers	30		
		2 treadle cutters	20		
		2 " " screws	20		
		2 presser ft. screws	20		
		2 needle set "	20		
			2 10		
		40 per cent	84		
			1 26		
		2 set 3-whl. castors, 2 " swevel "	1 00		
		6 G. & B. tuckers	2 50		
		3 J. rufflers	2 38		
		3 set G. P. hemmers	75		
		3 corders	1 00		
		6 brushing rubbers	18		
				9 07	
1876					
Jan'y	27	108 needles		2 16	
				91 00	
		Dr	$91 00		
		Cr	3 03		
		Dr. balance	$87 97		

38

EXHIBIT "C."

List of Personal Notes of Crockwell & Bassett under Consignment Contract.

Date.	Due.	No. or folio.	Name.	With—		
8-14-75	2-14-76	5568	Crockwell & Bassett	Victor S. M. Co., bal.		34 80
8-21-75	2-21-76	5573	"	"		16 25
8-28-75	2-28-76	5584	"	"		33 50
9-25-75	3-25-76	6122	"	"		164 40
10-2-75	4-2-76	6568	"	"		7 50
10-6-75	4-16-76	6576	"	"		16 25
10-30-75	4-30-76	6599	"	"		32 50
11-13-75	5-13-76	7094	"	"		16 50
8-14-75	5-14-76	7048	"	"		109 80
11-20-75	5-20-76	7106	"	"		29 75
8-21-75	5-21-76	7040	"	"		16 25
11-27-75	5-27-76	7114	"	"		16 25
8-28-75	5-28-76	7057	"	"		33 50
9-4-75	6-4-76	7545	"	"		16 25
12-4-75	6-4-76	7602	"	"		2 50
9-11-75	6-11-76	7548	"	"		23 40
12-8-75	6-18-76	7617	"	"		9 25
9-2-75	6-25-76	7580	"	"		164 40
1-1-76	7-1-76	8079	"	"		35 00
10-2-75	7-2-76	8032	"	"		7 50
10-9-75	7-9-76	8038	"	"		4 00
10-16-75	7-16-76	8052	"	"		16 25
10-23-75	7-23-76	8064	"	"		4 50
10-30-75	7-30-76	8070	"	"		32 50
2-5-76	8-5-76	8615	"	"		16 25
11-13-75	8-13-76	8565	"	"		16 50
8-14-75	8-14-76	8511	"	"		109 90
2-19-76	8-19-76	8630	"	"		45 50
11-20-75	8-20-76	8575	"	"		29 75
8-21-75	8-21-76	8518	"	"		16 25
2-26-76	8-26-76	8632	"	"		16 25
11-27-75	8-27-76	8588	"	"		16 25
8-28-75	8-28-76	8533	"	"		33 75
9-4-75	9-4-76	9005	"	"		16 25
9-11-75	9-11-76	9011	"	"		23 45
	Am't forward					1,182 90

39

	Bro't for'd					Amount. 1,182 90
12-18-75	9-8-76	9101	Crockwell & Bassett	Victor S. M. Co.		9 25
3-18-76	9-18-76	9151	"	"		18 40
9-25-75	9-28-76	9045	"	"		164 45
1-1-76	10-1-76	9581	"	"		34 00
10-2-75	10-2-76	9509	"	"		7 75
10-16-75	10-16-76	9525	"	"		16 25
10-30-75	10-30-75	9548	"	"		32 50
2-5-76	11-5-76	10080	"	"		16 25
11-13-75	11-13-76	10035	"	"		17 00
2-14-76	11-17-76	10094	"	"		45 50
11-20-75	11-20-76	10046	"	"		30 25
2-26-76	11-26-76	10101	"	"		16 25
11-27-75	11-27-76	10056	"	"		16 25
3-18-76	12-18-76	10562	"	"		18 45
12-18-75	12-18-76	10527	"	"		9 25
1-1-76	1-1-77	2	"	"		35 00
2-5-76	2-5-77	214	"	"		16 25
2-19-76	2-19-77	219	"	"		45 50
2-26-76	2-26-77	223	"	"		16 25
3-18-76	2-18-77	422	"	"		18 40
						1,766 10

CHICAGO, *June* 3, 1878.

40 EXHIBIT "D."

List of Crockwell & Bassett's Guaranteed Notes under Consignment Contract.

Date.	Due.	No. or folio.	Name.	Rating.	Amount.
10-20-75	9-20-76	9076	James Armtoff	Bad	35 00
"	11-20-76	10044	"	"	40 00
1-11-76	7-11-76	8102	F. S. Fenis	"	25 00
"	10-11-76	9592	"	"	20 00
"	1-11-76	23	"	"	25 00
9-25-75	9-25-76	9064	Lewis Hatch	Half bal.	23 83
12-10-75	10-10-76	9570	Robert Sheen	" bal.	35 00
9-25-75	9-29-76	9065	C. M. Fairbanks	"	30 00
1-29-76	7-29-76	8113	J. M. Ballinger	Bad	20 00
"	10-29-76	9610	"	"	10 00
"	1-29-77	125	"	"	20 00
1-8-76	10-8-76	9591	James J. Loveless	"	40 00
"	1-8-77	22	"		35 00
					353 83

CHICAGO, *May 26th*, 1879.

(Endorsed:) 4099. Victor Sewing Machine Company *vs.*
41 George Wallace Crockwell, Charles Henry Bassett, Jr., William H. Streeper, Daniel Grenig & Edmund H. Murphy. Complaint filed June 12th, 1879. C. S. Hill, clerk. By B. P. Hill, deputy clerk. Issued June 13th, 1879. Marshall & Royle, attorneys for plaintiff.

Answer.

42 In the 3d Judicial Dist. Court in and for the Territory of Utah. No. 4099.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., William H. Streeper, Daniel Grenig, and Edmund Murphy, Defendants.

Now comes George Wallace Crockwell and Charles Henry Bassett Jr., defendants herein, and for their answer to complaint of plaintiff deny that pl'ff performed all the matters, things or conditions resting or obligatory upon it to do and perform under the said agreement set forth in the complaint.

Deny that the conditions in said bond as set forth in plaintiff's complaint were broken, or that the defendants, or either of them, have failed to keep the conditions thereof as first alleged in plaintiff's complaint, to its damage in any sum whatever.

These defendants deny that they failed or neglected to report to plaintiff each week all machines furnished by plaintiff or sold by these defendants, and deny that they failed to remit to plaintiff all sums of money coming into their hands, or account therefor, in accordance with the said agreement declared up[on] in this complaint to the then entire satisfaction of plaintiff.

43 These defendants allege the facts to be that they were partners, doing business in Salt Lake City as the agents of the plaintiff, and, in all things appertaining to plaintiff's business, followed plaintiff's instructions, and, as such agents, did make all and singular of the reports mentioned in said agreement, and did remit all and singular of the moneys received by them by reason of the said agency and agreement upon which it was based, being the agreement mentioned in plaintiff's complaint. These defendants admit as agents aforesaid that between the 3d day of July, 1875, and the 10th day of February, 1876, as such agents they did receive divers and sundry sewing machines, which were sold by these defendants as the agents of plaintiff, but they deny that they have failed or refused to account in a proper manner for the same and all of them, and these defendants deny that by reason of these sales they are indebted to plaintiff in the sum of $\$146\frac{82}{100}$, or any other sum whatever, and, further answering, the defendants allege that all the items set forth in said Exhibit "A," and sued upon in this said first division of said complaint, accrued and were payable more than two years before the commencement of this action, and that action to recover the same alleged to be due on said behalf has not been commenced within the time provided by the laws of Utah Territory, and that recovery is now barred by the Statute of Limitations.

These defendants deny that they are indebted to plaintiff by reason of the matters and things set forth in the first subdivision
44 of complaint, as per Exhibit "A" of said complaint, and allege

that Exhibit "A" is a false and erroneous exhibit or statement in this, that in addition to the amount credited there was also duly remitted to plaintiff by these defendants five per cent. of all machines sold by defendants, being the deposit mentioned in article (5) of said agreement, which, in the aggregate, amounts [to] $203, which amount should be added as a credit in favor of defendants upon said Exhibit "A," though all of the liabilities in this behalf have long since been settled, as will hereafter more fully appear.

Defendants admit to the purchase of divers and sundry parts of machines, as set forth in the second subdivision of said complaint, upon which there is claimed to be due the sum of $87\frac{97}{100}$, but deny that they failed or account for the same. And, further answering, defendants allege that said account, and every item and charge accrued and was due, if at all, more than two years before the commencement of this action, which was not commenced within the time limited by the Code of Civil Procedure of Utah, and is now barred by the Statute of Limitations, and defendants deny that there is due plaintiff upon said attachment account the sum of $87\frac{97}{100}$, or any other sum whatever. Defendants admit that in their business as aforesaid they did make and deliver to plaintiff the certain promissory notes mentioned in Exhibit "C" of plaintiff's complaint; but deny that there is due and unpaid upon the same the sum of $\$1{,}766\frac{10}{100}$ as principal, or $\$609\frac{83}{100}$ as interest, or $\$237\frac{69}{100}$ as attorney fees, but admit that there is some amount due upon said notes, the exact amount to defendants unknown. Defendants admit the endorsements to plaintiff of certain promissory notes, mentioned in the third subdivision of plaintiff's complaint, and referred to in Exhibit "D" of said complaint, but deny they are now held for said endorsement or guarantee, and that the notes were never properly protested by the plaintiff, or these defendants duly [notified] of their non-payment, or either of them; and defendants, further answering, say, that on [or] about the 28th day of March, 1876, a settlement and accounting was had between plaintiff and the defendants, whereupon there was acknowledged and found due plaintiff a certain sum of money, the exact amount of which these defendants are now unable to state. But in said settlement, all the notes, accounts, articles, and items, and all the charges, claims, and demands sued upon in this action, for which a recovery is claimed and sought herein, were included, passed upon, and adjusted, and their amounts fully examined into and understood, and a full understanding at, and an amount fixed and agreed upon as the aggregate of the indebtedness of these defendants to said plaintiff, and the defendants having at that time in their hands, and being the owners of certain notes and negotiable paper, the par value of which exceeded by several hundred dollars the amount agreed upon as due from defendants to plaintiffs, and plaintiff then and there agreed with the defendants to take such notes and negotiable paper in payment of said amount.

Plaintiff then and there waived actual delivery thereof, and directed these defendants to retain and collect said notes as the special agents in that behalf, and forward the proceeds to plaintiff when

collected, and generally to hold said notes subject to the order of plaintiff and as plaintiff's agent, for the collection thereof; these defendants did so hold said notes and collected a portion of the same, and upon plaintiff's order and request forwarded the remainder of said notes to plaintiff, and the same are now retained by plaintiff and are solvent and collectable. These last alleged matters and things, with reference to the accord and satisfaction, plaintiff was represented by its duly authorized and appointed agent, George Wilkenson.

GOLDTHWAIT & MAXWELL,
Att'ys for Def'ts.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

George Wallace Crockwell, being first duly sworn, says: That he is one of the defendans in the above entitled action; has heard the foregoing answer, and know- the contents thereof; and that the same is true of his own knowledge, excepting those matters and things stated on information and belief, and as to those matters he believes it to be true.

GEO. W. CROCKWELL.

47 Subscribed and sworn to before me, this Sept 10, 1879.
O. J. AVERILL, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

(Endorsed:) 4099. Victor Sewing Machine Co. *vs.* Crockwell and Bassett *et al.* Answer of Crockwell & Bassett. Filed Sept. 10th, 1879. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Goldthwait & Maxwell, attorneys.

48 In the District Court, 3rd Judicial District, Territory of Utah, Salt Lake County.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GRENIG, and EDMUND H. MURPHY, Defendants. } No. 4099.

Now comes Edmund H. Murphy and William H. Streeper, defendants in the above-entitled action, and, seperately answering the pl'ff's complaint herein, upon information and belief deny—

That pl'ff duly or at all performed the matters and things or conditions vesting or obligatory upon it to do or perform under the said agreement set forth in the complaint.

And upon information and belief defendants deny the conditions of said bond were broken, or that the defendants, or either or any of them, have failed to keep the conditions thereof as first alleged in pl'ff- complaint, or in any other manner.

And upon information and belief deny that defendants, Crockwell & Bassett, failed or neglected to report to said plaintiff each

week all the machines furnished by pl'ffs or sold by the defendants, Crockwell & Bassett, or failed to remit the proceeds of such sales, or any of them, or failed each week to remit to said pl'ff such an amount as would equal the retail price of all the machines
49 sold, less the commissions set forth in the complaint, and fixed and provided for in the agreement declared upon in this action.

And def'ts, upon information and belief, deny that said defendants, Crockwell & Bassett, failed to remit the five per cent. provided for in said agreement, or any part thereof; and allege, upon information and belief, that said Crockwell & Bassett did report all machines furnished by pl'ff or sold by themselves to said plaintiff each week, as provided in said agreement sued upon, and did remit all and singular the moneys received therefrom, and the said five per cent. on all machines sold within the time and in the manner provided in said agreement.

Defendants admit that between the 3rd day of July, 1875, and on the 10th day of February, 1876, pl'ffs delivered to said Crockwell & Bassett divers sewing machines, which were sold by the said Crockwell & Bassett, but on information and belief they deny that said Crockwell & Bassett failed or refused, or fail or refuse, to pay or remit to said pl'ff the proceeds of said sales, or any sales, of machines or any part thereof, to the damage of pl'ff in the sum of 146.82 dollars, or in any sum whatever or otherwise; and deny, on information and belief, that the sum of $146.82, or any sum, is due pl'ff in said behalf.

And, further answering, defendants allege that all the items set forth in the said Exhibit "A" and sued upon in the said first subdivision of pl'ff's complaint accrued and were payable more
50 than two years before the commencement of this action; and that action to recover the sums alleged to be due in said behalf has not been commenced within the time prescribed by the laws of Utah Territory, and that recovery in said behalf is barred by the statute of limitations.

And def'ts, on information and belief, deny that the amounts remitted with proper credits thereon, or the amount due and not remitted, or the balance now due pl'ff, are set forth in said Exhibit "A;" and deny, on information and belief, that there is any balance not remitted to pl'ff; and, on information and belief, allege that said Exhibit "A" is a false and partial statement, and erroneous in this: That in addition to the amounts therein credited to def't-, Crockwell & Bassett, there was also duly remitted to said pl'ff five per cent. of all machines sold for cash and five per cent. of all other machines sold by said Crockwell & Bassett, being the deposit provided for in article 5th of the agreement between pl'ff and said Crockwell & Bassett; and def'ts, upon information and belief, allege that, though said agreement has long since been settled up between said pl'ff and said Crockwell & Bassett, that pl'ff has not given them credit for or repaid to them said five per cent. deposit, which amounts in the aggregate to the sum of $203.00, which said sum should be added to said def'ts' credits on said Exhibit "A."

Defendants admit the purchase by defendants, Crockwell & Bassett,
from pl'ff of certain parts of machines set forth in the sec-
51 ond subdivision of pl'ff– complaint and therein called Exhibit
B, and designated as the attachment account, and upon which
a balance of $87.97 is claimed to be due, but, upon information and
belief, deny that said Crockwell & Bassett failed or refused to pay
for the same or any part or item of such purchases to pl'ff's damage
or otherwise.

And, further answering, def'ts allege, upon information and belief, that said accounts and every item and charge therein accrued and was payable and due more than two years before the commencement of this action; that this action has not been commenced within the time limited by the Code of Civil Procedure of the Territory of Utah, and is barred by the statute of limitations.

And upon information and belief def'ts deny that there is due pl'ff on said attachment account or otherwise the sum of $87.97, or any sum whatever. Defendants admit that the said Crockwell & Bassett made said promissory notes sued upon in the complaint and more particularly set forth in Exhibit "C" thereof, but on information and belief they deny that said notes are due, or payable, or unpaid, either in violation of art. 8th of said agreement or otherwise, and on information and belief deny that said notes were given in pursuance of said contract or agreement sued upon, or that said Crockwell & Bassett have failed or refuse, or still fail or
refuse, to pay said notes, or for said machinery, or any ma-
52 chinery received or purchased by them of pl'ff, or that there
is the sum of $1,766.10 of principal, or $609.93 of interest, or
$237.69, or any other sum of attorney's fees, or any other sum what-
ever, either of principal, interest, or attorney's fees, due on said
notes, or either or any of them, or for said machines, or upon or
under the terms, or in pursuance of said agreement or in any way
arising out of the same; and on information and belief they deny
that there is anything due or unpaid on said notes, or any or either
of them, or that by the non-payment of said notes, or any or either
of them, pl'ff [is] damaged in the sum of $2,613.63, or in any sum
whatever, or that by the non-payment of said notes that the condi-
tions or any condition of said bond have been broken, or that the
non-payment of said notes constitutes a breach of said bond. De-
fendant- on information and belief deny that the conditions or any
conditions of said bond have or has been broken as alleged in the
third subdivision of pl'ff's complaint, namely, in the endorsement,
transfer, or guarantee of certain notes in pl'ff's complaint alleged to
have been taken by Crockwell & Bassett for sewing machines, and
by them endorsed to pl'ff, and on information and belief deny that
said Crockwell & Bassett are liable on account of their said alleged
alleged guaranty of said notes, particularly described in Exhibit
"D" of said complaint, or on any or either of them, and on infor-
mation and belief deny that by the terms of said agreement
53 or of said bond def'ts were or are liable for the non-payment
of said notes, or any or either of them, or that by the non-

payment thereof the conditions or any *any* condition of said bond have or has been broken.

And on information and belief defendants deny that said Crockwell & Bassett had due notice, or any notice, of the non-payment of said notes, or either or any of them, or that by the non-payment thereof that pl'ff is damaged in the sum of $358.83, or any sum whatever.

And defendants, further answering, allege that on or about the 28th day of March, 1876, said pl'ff, by its duly authorized agent, applied to Edmund H. Murphy, one of the defendants, to become surety on a second bond of the said Crockwell & Bassett, and was desirous of vacating and annulling the agreement then existing between the said pl'ff and said Crockwell & Bassett, and of entering into a new and different contract with said Crockwell & Bassett for carrying on said sewing machine business in said Territory of Utah.

That said pl'ff, by its agent aforesaid, applied to said defendant Murphy to become surety on a new bond, to be given by said Crockwell & Bassett, to secure the performance of said new contract, and that said Murphy was unwilling and refused to become surety on said bond until the matters appertaining to the old bond and contract, and all the business and accounts between the pl'ff and said Crockwell & Bassett were settled up and adjusted and discharged, and said defendant released from said bond and all liability in respect thereto.

54 That on or about said date, to wit, about the 29th day of March, 1876, a settlement and accounting was had between pl'ff and said Crockwell & Bassett, whereupon there was acknowledged and conceded and found to be due to said pl'ff a sum of money, the exact amount of which def't is unable to state, but def't alleges, upon information and belief, that in said settlement and accounting all the notes, accounts, articles, and items, and all the charges, claims, and demands sued upon in this action, and for which a recovery is claimed and sought herein, were included, passed upon, and adjus-ed, and their accounts fully examined into and unders.ood, and a full understanding arrived at, and an amount fixed and agreed upon as the aggregate of the indebtedness of said Crockwell & Bassett to said pl'ff; and said Crockwell & Bassett having at that time in their hands, and being the owners of certain notes and negotiable paper, the par value of which exceeded by several hundred dollars the amount claimed by pl'ff as due it from said Crockwell & Bassett, pl'ff, as def'ts state on information and belief, there and then agreed with the said Crockwell & Bassett to take said notes and negotiable paper in full accord and satisfaction of all sums due them from said Crockwell & Bassett, to release said Crockwell & Bassett and these def'ts from all liability upon the agreement and bonds sued
55 upon herein, and that said Crockwell & Bassett then and there offered to deliver over said notes to pl'ff, but that said pl'ff by its said agent waived actual delivery thereof, and directed said Crockwell & Bassett to retain and collect the said notes as the agents of plaintiff, and forward the proceeds to plaintiff when collected,

and generally to hold said notes and negotiable paper subject to pl'ff's order, and as pl'ff's agents for the collection thereof; and that said Crockwell & Bassett did so hold said notes and collected a part thereof, and forwarded the proceeds thereof to said pl'ff, and upon pl'ff's order and request forwarded the remainder of said notes to pl'ff, and the same are now retained by pl'ff, and are solvent and collectable, and are more than sufficient in amount and value to offset the whole of pl'ff's demand. That after said agreement with said Crockwell & Bassett respecting the said accord and satisfaction as aforesaid (while said agreement was made, as def'ts are informed and believe, for the purpose of procuring said Murphy's signature upon said second bond as aforesaid), and about the date of the said settlement the said pl'ff, by its said agent, in order to procure the said Murphy to sign the said second bond, assured said def't Murphy that all claims and demands of pl'ff against said Crockwell & Bassett had been settled up and discharged, and that the bond set forth in the pl'ff's complaint had been released and discharged,
56 and in consideration of such release and discharge said defendant Murphy agreed to go upon said second bond, and that when assured as aforesaid that said discharge and release had been made, he in consideration thereof and in fulfillment of his said promise did sign the same as a surety thereto, and that the consideration of his signing said second bond was his release from the bond sued upon herein and liability thereunder. And def'ts further allege that relying upon the assurance of said pl'ff, by its said agent, that said def'ts, Crockwell & Bassett, had settled with pl'ff, and that said bond had been released and def'ts discharged from liability thereupon, which said representations were made and assurances given by pl'ff's said agent to def't Streeper as well as def't Murphy, these defendants were put off their guard and prevented from securing themselves against any loss on said bond by compelling said Crockwell & Bassett to indemnify them against any possible breach thereof or claim of pl'ff in that behalf, which def'ts on information and belief allege that said Crockwell & Bassett were then able to have done, and but for the said assurance of pl'ff would have been compelled by these def'ts to have done.

That said Crockwell & Bassett have since become insolvent and not able to indemnify def'ts against any amount that might be recovered against them on account of said agreement and bond
57 sued upon, or any judgment that might be rendered in that behalf.

Wherefore, in consideration of the premises, def'ts pray that they be hence dismissed, with their costs.

SUTHERLAND & McBRIDE,
Attorneys for Def'ts, Murphy and Streeper.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

Edmund H. Murphy, being first duly sworn, deposes and says: I am one of the def'ts herein. I have heard the foregoing answer read and know the contents thereof, and the same is true of my own

knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

EDMUND H. MURPHY.

Subscribed and sworn to before me, this 1st day of July, 1879.

[SEAL.] EDWARD P. SUTHERLAND,
Notary Public.

(Endorsed:) In district court, 3d judicial district of Utah. Victor Sewing Machine Company *vs.* Geo. W. Crockwell *et al.*, def'ts. Answer of Murphy & Streeper. Service admitted July 2d, 1879. Marshall & Boyle, pl'ff's att'ys. Filed July 2d, 1879. C. S. Hill, clerk, by B. P. Hill, deputy clerk.

58 TUESDAY, *May 18th, A. D.* 1880.

VICTOR SEWING MACHINE COMPANY *vs.* GEORGE W. CROCKWELL *et al.*

Said cause now comes on regularly for trial; Bennett & Harkness appear as att'ys for plaintiff, and Mess. Sutherland & McBride for defendants; and the defendant Daniel Greenig having made default herein, and it appearing to the court that he has—

Ordered, that his default be, and is hereby, entered herein.

A jury of twelve is duly sworn and impannelled to try said cause, to wit: M. K. Harkess, Christian Rehmke, Arthur Smith, Charles M. Player, Chas. King, Robert Gray, James A. Cunningham, Adolph Anderson, N. S. Rausaholf, Wm. Gebby, Wm. R. Adkins, Philander Butler. Defendant Murphy asks to have stricken out from his answer herein and the words "in consideration of," and insert therein instead the words "On being told that he had been released from old bond." Depositions of Herbert D. Harris, Henry Kehrs, and —— Riggs read in evidence by plaintiff; and to the offer in evidence of certain notes defendant objected, and, being argued by counsel, is taken under advisement by the court until to-morrow at ten o'clock a. m.

WEDNESDAY, *May 19th, A. D.* 1880.

THE VICTOR SEWING MACHINE COMPANY
vs.
GEORGE W. CROCKWELL *et al.*

Hearing of the case resumed; attorneys for parties present. Upon the question raised yesterday of the admissability in evidence of the guaranteed and personal notes herein, the court finds that the guaranteeing of the said notes is *per se* a compliance with terms of agreement, and consequently no liability resting upon bondsmen.

59 Plaintiff specifically offers said notes mentioned in Exhibits C & B of the complaint, and to each offer the defendants objected, and the court sustained the objection; to each of which rulings plaintiff, by its counsel, duly excepted; whereupon defendants, by their att'ys, moved for a judgment of non-suit, and the same is allowed by the court and jury discharged; and it is ordered that judgment be accordingly entered that plaintiff take nothing by its

said suit, and that defendants answering recover their costs herein, taxed at $27.85; to all of which rulings and orders plaintiff, by its attorneys, duly excepted.

Judgment entered in judgment book E, folio —.

60 *Judgment of Non-Suit.*

TERRITORY OF UTAH, *County of Salt Lake:*

District Court, Third Judicial District.

VICTOR SEWING MACHINE COMPANY, Plaintiff,

vs.

GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GREENIG, and EDMUND H. MURPHY, Defendants.

This cause coming on for trial at the April term of said court, to wit, on the 18th day of May, 1880, before a jury, Mess. Bennett and Harkness appeared as attorneys for plaintiff, and Mess. Sutherland and McBride for the answering defendants; and the defendant, Daniel Greenig, having been duly served with summons herein, and having failed to appear or answer the complaint in this action as required by law, or at all, the default of said defendant is now entered herein. A jury of twelve persons is duly sworn and empannelled to try said cause, and the plaintiff having introduced evidence on its part and rested its case, thereupon the said defendants, by their attorneys, move for a judgment of non-suit, which is allowed by the court, and the jury is discharged.

It is therefore ordered, adjudged, and determined by the court that the plaintiff take nothing by its said suit from defendants; and, further, that the defendants, George Wallace Crockwell,

61 Charles Henry Bassett, Jr., William H. Streeper, and Edmund H. Murphy, do have and recover of and from said plaintiff their costs on this behalf expended, and taxed at the sum of $27.85.

Judgment entered May 19, 1880.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original judgment made and entered by this court May 19, 1880, in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 19th day of May, A. D. 1880.

[SEAL.] O. J. AVERILL, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

(Endorsed:) 4099. 3d dist. court, Utah. Victor Sewing Machine Co. *vs.* Geo. W. Crockwell *et al.* Judgment. Filed May 19th, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

62 In the District Court, Third Judicial District, Salt Lake County, Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL *et al.*, Def'ts.

Notice is given that the plaintiff appeals to the supreme court for the Territory of Utah from the judgment rendered in this action in this court on the 19th day of May, 1880, in favor of the defendants and against the plaintiff, and from the whole of said judgment. The judgment is one of non-suit, and for $27.85, costs of suit.

BENNETT & HARKNESS,
Att'ys for Pl'ff.

(Endorsed:) 4099. 3d dist. court. Victor Sewing Machine Co. *vs.* G. W. Crockwell *et al.* Notice of appeal. Filed June 4, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

63 *Opinion of the Court by Twiss, A. J.*

In Supreme Court, Utah Territory.

VICTOR SEWING MACHINE CO. *vs.* GEORGE W. CROCKWELL *et al.*

On motion of appellant for a rehearing.

The plaintiff seeks to recover a judgment upon a bond signed by the defendants, Crockwell and Bassett, as principals, and the other defendants, as sureties, upon the breach of a contract between the plaintiff and Crockwell & Bassett. The condition of the bond is "that if said Crockwell and Bassett shall pay unto said Victor Sewing Machine Company, under or pursuant to the within contract, whether by notes, renewals or extension of notes, or accounts, or acceptances, endorsements, or otherwise, hereby waiving presentment for payment, notice of non-payment, protests or notices of protests and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed, or assigned, and shall well and truly keep and perform, in all respects, according to its true intent, the contract or agreements to which this obligation is attached, * * * then this obligation to be void; otherwise to remain in full force and virtue."

The contract is voluminous, containing stipulations directing in detail the performance of the business therein proposed or con-
64 templated by the parties, which was the consignment of sewing machines by the plaintiff, a corporation having a place of business in Chicago, to Crockwell and Bassett, at Salt Lake City, and the sale thereof by them as consignees, who were to devote their entire time to the introduction and sale of the Victor sewing machines, for cash on delivery, if possible, but were allowed, under certain restrictions, to sell upon time, taking notes therefor, payable to the plaintiff. All promissory notes so taken were to be guaranteed by the consignees and delivered to the consignor. The blank endorsement thereof by the consignees, before delivery to the plaintiff, was, by the terms

of the contract, made and understood to be a guaranty of the payment of such notes.

That the consignees were to report, within the time mentioned all sales, whether for cash or for notes, and remit all moneys received, and that the plaintiff should sell parts of machines and attachments to Crockwell and Bassett, which were to be settled for with cash every thirty days, unless otherwise mutually agreed, and that the consignees might give their personal notes for such machines as they might dispose of otherwise than for cash or note.

The complaint charges that under and in pursuance of said contract the defendants, Crockwell and Bassett, gave their order to the plaintiff for machines and parts of machines; that said orders were received and accepted, and the machines and parts of machines ordered were accordingly delivered, and that Crockwell and Bassett failed and refused to remit to the plaintiff an alleged
65 balance of the proceeds of such machines, and to pay an alleged balance for parts of machines and attachments sold and delivered by plaintiff to them or their order. The plaintiff asks for judgment for the aforesaid balances, as shown by the detailed and itemized accounts referred to in and annexed to the complaint.

The defendants in their answers pleaded the statute of limitations as a defense to that part of the plaintiff's claim arising upon a breach of bond, by reason of the failure of the principals thereof to remit money to the plaintiff for machines consigned, or to pay for parts of machines or attachments sold by plaintiff to Crockwell and Bassett. This plea raises the question of the liability of the defendant upon the bond for the alleged unpaid balances for the machines consigned and parts of machines and attachments sold by the plaintiff to Crockwell and Bassett. The court below ruled that the statute was a bar, of which the appellant complains, and assigns it as an error. Under the statute an action upon a contract, obligation, or liability, not founded upon an instrument in writing, is barred, unless commenced within two years from the time the right of action occurs; but if founded upon an instrument in writing, is barred unless commenced within four years.

By the record it seems to be admitted that the right of action accrued more than two years before the action was commenced. Is the action on the bond, charging as a breach of contract the
66 non-payment of the itemized accounts, founded upon an instrument in writing? If it is, the statute is not a bar; but, on the contrary, if it is an action upon a contract, obligation, or liability not founded upon an instrument in writing, it is barred. The contract was not, and was not intended to be, a consignment of machines and attachments, and no indebtedness on the part of Crockwell and Bassett was created by its execution and delivery. But it did contemplate and provide that Crockwell and Bassett should give their orders to the plaintiff for machines, upon which plaintiff was "to ship from time to time such machines as in the judgment of the consignor might be necessary for the consignees to do a satisfactory business," and that the consignees should sell the same, and, after deducting their commissions, remit the money or proceeds received

therefor to the consignor. All of these things were done by the parties, under, in accordance with, and pursuance to the written contract.

Although the indebtedness on the part of the consignees to the consignor was created by the receipt of the proceeds of the order for the machines consigned or delivered, and the record fails to show any acknowledgment by the consignees, by reports or otherwise, in writing, of such sale and receipt of proceeds, yet, of all this business was provided for and directed in detail by the contract, which contains the promise in writing of the consignees to remit to the
67 consignor the proceeds of all sales within the time therein named, a failure on the part of the consignees to remit the proceeds of sales of machines consigned, and to pay for the parts of machines and attachments sold, is a breach of the written contract, the faithful performance of which the bond sued upon was given to secure. The accounts annexed to the complaint for machines consigned, and parts of machines and attachments sold, are not the basis or the meritorious cause of action, but only a means of ascertaining the amount of indebtedness, if any, due from one party to the other under the written contract.

We are therefore of the opinion that the action upon the bond, alleging as a breach thereof that Crockwell and *and* Bassett failed and refused to remit the proceeds of the sales of the machines consigned to them by the plaintiff, and to pay for the parts of machines and attachments sold to them, is an action founded upon a contract or obligation in writing, and therefor not within the statute barring an action brought upon a contract or obligation not founded upon a written contract or obligation, and that the statute of limitation is not a bar.

It is claimed by the respondents that the agreement of Crockwell and Bassett to guarantee, and that their blank indorsement should constitute a guaranty of all notes taken by them, is not an agreement that such notes shall be paid, or that Crockwell and Bassett guaranteed the notes in the very terms of the contract, and
68 having done that, their obligations under the contract ceased.

The contract required that Crockwell and Bassett should in certain cases sign, and in other cases guarantee, the notes taken by them for the machines consigned to and sold by them; in this respect they complied with the contract, but they failed to pay the notes thus signed or guaranteed. Is this failure a breach of the bond? I am of the opinion that the condition of the bond requiring Crockwell and Bassett to pay all moneys which should become due, "under or pursuant to the within contract, or which shall arise therefrom by notes, renewals, or extensions of notes, acceptances, or otherwise, hereby waiving presentment for payment, notice of protest, and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed, or assigned," clearly implies, if not expressly asserts, an undertaking in the bond, that the failure to pay any note made or guaranteed to the plaintiff by Crockwell and Bassett under or in pursuance of the contract, was a breach of

the bond, and that the obligation of the bond is to be taken and construed together with the contract, and when so construed there is no doubt as to the obligation of the sureties on the bond to the obligee thereof, upon the failure of the makers and guarantors to pay any of the notes made or guaranteed by Crockwell and Bassett to the plaintiff under and by virtue of the contract. For
69 these reasons the case is remanded to the district court for a new trial.

Emmerson, A. J., concurred, and Hunter, C. J. dissented.
Filed March 14, 1882.

70 In Supreme Court.

SATURDAY, *June* 25, A. D. 1881.

THE VICTOR SEWING MACHINE CO., Appellants,
vs.
GEORGE W. CROCKWELL *et al.*, Respondents.

From 3d dist.

This cause having [been] argued and submitted on a rehearing granted, and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgment heretofore entered by this court herein, and the judgment of the district court therein, be, and the same are hereby, reversed, and said cause is remanded to said district court for new trial; and it is further ordered and adjudged that appellant have and recover of and from respondents the sum of sixty-seven dollars costs herein.

TERRITORY OF UTAH, }
Salt Lake County, } *ss*:

I, Ezra T. Sprague, clerk of the supreme court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true, and correct copy of the judgment of said court in the cause therein entitled of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 14th day of July, A. D. 1881.

[SEAL.] E. T. SPRAGUE, *Clerk*.

(Endorsed:) 4099. Victor Sewing Machine Co. *vs.* Geo. W. Crockwell *et al.* Remittitur. Filed July 14, 1881. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

71 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 1st day of November, A. D. 1881.

Present: the Hon. John A. Hunter, judge of the third judicial district.

VICTOR SEWING MACHINE COMPANY, Plaintiff, }
vs. } 4099.
GEO. W. CROCKWELL *et al.* }

On motion of Mess. Bennett, Harkness and Kirkpatrick, attorneys for

plaintiff, defendants, by their attorneys, Mess. Sutherland & McBride consenting, it is ordered that this cause be, and the same is hereby, referred to E. T. Sprague, Esq., as referee of the court, to hear, determine, and report judgment herein.

I, O. J. Averill, clerk of the district court, of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above entitled action on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of said court, this 1st day of Nov'r, A. D. 1881.

[SEAL.] O. J. AVERILL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

72 District Court, Third Judicial District, Utah Territory, Salt Lake County.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEO. W. CROCKWELL, CHARLES H. BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GRENIG, & EDMUND H. MURPHY, Def'ts. } No. 4099.

This action having been referred to me by an order of the court, dated Nov. 1, 1881, to hear, determine, and report a judgment, and, having heard the proofs [and] allegations of the parties (other than Daniel Genig, one of the defendants, who made default), I now make and report the following finding of fact and conclusions of law, and determine the case, and report a judgment as herein specified.

Findings of Fact.

1. That the defendants made, executed, and delivered to the plaintiff the agreement and bond set out in the complaint at the time and in the manner therein specified.

2. That under said agreement the plaintiff, before the commencement of the action, to wit, between July 3d, 1875, & Feb'y 10, 1876, sold & delivered to Geo. W. Crockwell & Chas. H. Bassett, Jr., partners, doing business in the firm name of Crockwell & Bassett (and hereinafter referred — as "Crockwell & Bassett"), parts of sewing machines at the prices named in said agreement, and at the
73 commencement of the action there was due and unpaid from said Crockwell & Bassett to the plaintiff on account of such sales the sum of $87.97, which sum, and interest thereon from the commencement of the action, is still so due and unpaid.

3. That under said agreement and prior to the commencement of the action, to wit, between July 3d, 1875, & Feb'y 10, 1876, the plaintiff consigned to Crockwell & Bassett divers sewing machines, which were received and sold by them, and for which they failed to account or remit the proceeds, by note or otherwise, to the value and amount of $146.82; and at the commencement of the action there

was due & unpaid from said Crockwell & Bassett to the plaintiff, on account of such consignment to and sales by said Crockwell & Bassett, the sum of $146.82. That since the commencement of the action the plaintiff has collected from collaterals and credited thereon various small sums, reducing the principal to $31.22, which, with interest from the commencement of the action, is still due and unpaid.

4. That between July 3d, 1875, & Feb'y 10, 1876, said Crockwell & Bassett sold divers sewing machines, consigned to them by plaintiff under said agreement, and delivered to the plaintiff their personal notes therefor, which notes were credited by plaintiff to said Crockwell & Bassett in their general account with the plaintiff. That said notes became due before the commencement of the action and were not and are not paid. That Exhibit "C," annexed to the complaint, is a correct statement of such notes. At the com-
74 mencement of the action the– was due on said notes for principal the sum of $1,766.10, and about $600 of interest, and there is now due thereon for principal and interest at least the sum of $2,750, exclusive of any allowance for att'y's fees, as stipulated in said notes.

5 Between the 3d day of July, 1875, and the 10th day of Feb'y, 1876, said Crockwell & Bassett guaranteed the payment of, and delivered to plaintiff, divers notes, more particularly described in Exhibit D to the complaint, and which were taken by said Crockwell & Bassett from purchasers of machines consigned by plaintiff to said Crockwell & Bassett under said agreement, and said notes were credited to Crockwell & Bassett in account, and at the commencement of the action there was due from said Crockwell & Bassett on account of said guaranteed notes the sum of $358.88, besides interest, and there is now due & unpaid to the plaintiff thereon over the sum of $450.

6th. That there is now due and unpaid from said Crockwell & Bassett to the plaintiff on account of the several matters set forth in the complaint more than the sum of $3,000.

7th. That said Crockwell & Bassett did not remit to the plaintiff five per cent. of the retail price of machines, less commissions, or any sum which is not fully credited to them in the accounts, the balance of which is reported as aforesaid.

8th. There was no settlement or accounting between Crockwell & Bassett & the plaintiff on the 28th day of M'ch, 1876, or at any time, & no adjustment of their indebtedness to plaintiff, and no agreement or accord or satisfaction made in regard to
75 such indebtedness.

8th. In March, 1876, a new contract for the sale of machines was made between the plaintiff and said Crockwell & Bassett, and a new bond given by the latter, upon which the def't, Edmund H. Murphy, became a surety. Pending the negotiations for such new contract, and before said Murphy became surety on the new bond, he inquired of George Wilkinson, who was the agent of the plaintiff to negotiate the new agreement in regard to the past business and the object of the new bond, and said Wilkinson in-

formed him, in substance, that said Crockwell & Bassett had done well, that the business was satisfactory to the plaintiff, and the plaintiff was about to give them a new contract under which they would get a larger per cent. and have a better opportunity to make money. No other or further representation- were made to said defendant Murphy prior to the execution by him of the new bond, and said representations were not false. At that time no settlement had been made of the accounts, but from casually looking over the accounts it appeared Crockwell & Bassett had in the shape of notes & leases far in excess of what they owed, and had the notes turned over to the plaintiff, and the notes and leases held by them been good & collectable, the same would have far exceeded their liabilities. At that time but a small portion of the indebtedness of Crockwell & Bassett to plaintiff was due, and it was not known but that
76 the notes and leases taken by Crockwell & Bassett were generally good and collectable.

9th. About Nov., 1876, when the business of plaintiff was taken from Crockwell & Bassett, and turned over to another party, the said def't, Edmund H. Murphy, in the presence of defendant Crockwell and others, inquired of said Wilkinson, who was plaintiff's agent to turn over said business, in regard to the condition of the business of Crockwell & Bassett, when the following conversation occurred between said Murphy & Wilkinson:

Q. Mr. WILKINSON: So far as the bondsmen are concerned, how did they stand?

A. Mr. MURPHY: So far as the boys (Crockwell & Bassett) have acted, they could not do better; everything is satisfactory and the business has been turned over to another party and everything is agreeable.

Q. If that is the case the bondsmen have nothing further to bother about?

A. No; everything is satisfactory and the business has been turned over.

This is the substance of representations made at that time, and I find that said def't Murphy got the impression that he was released on the bonds.

10th. About the 28th day of March, 1876, and during the negotiation for the new contract and bond, Crockwell & Bassett, desiring to obtain the def't Streeper as surety on the new bond, called him into their office, and in the presence of said Wilkinson, and
77 during a conversation then Charles H. Bassett informed said Streeper he had nothing to fear; and then Streeper asked Wilkinson if he was released or relieved on the first bond, and Wilkinson informed him he had nothing to fear on that, and made an affirmation which induced Streeper to believe he was no longer liable. Streeper did not execute the new bond.

11th. There is no evidence to show that any change has occurred in the financial condition of Crockwell & Bassett since the spring of 1876, and I find that no such change has occurred.

12th. At the time of the commencement of this action none of the notes guaranteed by Crockwell & Bassett, as aforesaid, had been due

four years, and there is no evidence of any change in the financial condition of the makers.

13th. George Wilkinson had no authority from plaintiff to bind the plaintiff by any declaration as to the release of said bonds or either of them. And I find he did not intend to make any statement concerning the release which was untrue or to deceive or mislead the defendants or any of them, and his statements were rather in the nature of assent to or non-denial of statements made by Crockwell & Bassett in his presence. I do not find he had or exercised any such apparent authority as *as* should induce the defendants
78 to rely on his statements concerning the business of Crockwell & Bassett on the satisfaction of said bonds without further inquiry.

As conclusions of law I find:

1. The non-payment of the several sums found due and unpaid from Crockwell & Bassett to the plaintiff, as in the findings of fact specified, constitute breaches of said bond, and for which breaches the sureties as well as the principals are liable.

2d. The action on the bond at the time of the commencement thereof was not bound by the statute of limitations in respect to any of said breaches.

3d. The plaintiff is not estopped nor its action barred or affected against any of the debts by reason of any representations made to the defendant Murphy or Streeper prior to or since the execution of the second bond referred to in the answer, nor was the execution of the second bond by the sureties procured by fraud.

4th. The plaintiff is entitled to judgment that it have and recover of and from the defendants the sum of three thousand dollars, and the costs of this action to be taxed.

E. T. SPRAGUE, *Referee.*

(Endorsed:) 4099. 3rd dist. court. Victor S. M. Co. *vs.* George W. Crockwell *et al.* Findings. Filed June 29, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

79 MONDAY, *July* 10, *A. D.* 1882.

VICTOR SEWING MACHINE COMPANY
vs.
GEORGE M. CROCKWELL *et al.* } 4099.

The referee herein appointed by this court having filed his report and finding in this — in pursuance of the terms of said reference, and the same being now brought on for hearing, the same is approved and adopted by the court as the findings of the court, and on motion of Mess. Bennett, Harkness & Kirkpatrick, attorneys for plaintiff, it is ordered that judgment be entered herein in favor of the plaintiffs and against said defendants for the sum of $3,000.00 found due, together with plaintiff's costs on this behalf expended, and taxed at the sum of $161.60; to which order and ruling the defendants, by their attorneys, duly excepted and filed their exceptions.

80 *Exceptions to the Findings of the Referee.*

District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, WILLIAM H. STREEPER, DANIEL GRENIG, and EDMUND H. MURPHY, Defendants. } No. 4099.

Now comes the defendants Streeper and Murphy, above named, and file their exceptions to the findings and judgment of the referee made herein, and assign the following reasons:

1st. Insufficiency of the evidence to justify the 8th finding of fact, in this: It is shown by the evidence of the witnesses, Crockwell & Bassett, also of Streeper, that about the 28th of March, 1876, the entire account of defendants C. & B. with the plaintiff was examined and adjusted, and it was agreed between them that the collaterals which plaintiff then held and received was sufficient to settle said account and leave a balance in said defendants' favor, and thereupon the old business was closed and settled by the delivery of these collaterals, and a new and different contract was entered into for the future. Said adjustment is also testified to by

81 the defendant Murphy and other witnesses for the defense.

2d. Insufficiency of the evidence to justify the 8th (*a*) finding of fact, in this: "That no other of further representations were made to said defendant Murphy (than is set forth in said finding), nor to the execution by him of the new bond, and that the said representations were not false;" whereas in the fact the said Wilkinson, plaintiff's agent, did represent and designedly lead said Murphy at the interview aforesaid to believe, and intentionally gave him to understand, and induced him to act thereon, that the business of Crockwell and Bassett was settled up to that date, and no liability resting upon the said Murphy by reason of his suretyship on the bond sued on. That while the representations made did not in words expressly state that the account and business was settled and closed, they were intended to produce that impression on said Murphy, and did lead him so to believe and act upon that belief, to his prejudice and injury. Said finding is also incorrect and not justified in its statement of the examination of the witness by the pl'ff's agent, in this: That it was not known but that the notes and leases taken by C. & B. were generally good and collectable. The testimony shows that they were good, and that for the pl'ff taking them out of the country and making no proper effort to collect them they would not have been lost.

82 3rd. To the 9th finding: That the statement of the interview and conversation between pl'ff's agent and def't Murphy "is the substance of representations made at that time;" whereas the testimony of Crockwell, the two Bassetts, Julius and Charles, shows that the said defendant was notified in that conversation that he had no liability as a surety resting on him, and that everything was satisfactorily settled.

4th. That the 10th finding of fact is not supported by the evidence; it does not state the evidence except in part, and that incorrectly. The testimony shows that Streeper caused a letter to be written to the plaintiff, to the effect that he wished to be released from the bond; that the pl'ff sent its agent to Utah in consequence of that letter, and an interview was held in the presence of C. & B. between the pl'ff's agent and Streeper on or about the 28th of March, and that on inquiry by said Streeper as to there being any liability resting on him under the bond sued on, told him he was "released" or "relieved" therefrom, and made a statement intended to induce him to become a surety on a new bond, and intended to influence him to act as a surety thereon, and that Streeper was honestly lead to believe, and it was intended by the pl'ff's agent he should believe, that his liability on this bond had terminated.

5th. That the 11th finding is not justified by the evidence in this:

83 In the spring of 1876 they were doing a good business and making money and intrusted with larger credit, which was entirely withdrawn in November following with heavy liabilities incurred in the meantime to this plaintiff, which admitted to be uncollectable unless from the other defendants in this case; and their changed condition was in consequence of the unfortunate contract entered into by them with the plaintiff in 1876 upon assurance made to them by pl'ff's agent, which was false, and by which they were mislead.

6th. To the 12th finding, that is not justified by the evidence. The testimony shows that the makers of the notes were in good financial condition from the times when they were taken, and that they were collectable, but pl'ff neglected to collect them, and they are barred by limitation.

7th. To the 13th finding of fact in this: The testimony shows that he had entire charge of the business in Utah; that he exhibited no limitations to his authority, and that he was expressly authorized, as the letter of pl'ff in evidence, to answer all questions pertaining to the business, and finally took the entire business from C. & B., and turned it over to other parties, and authority to put an end to the entire contract exercised by him, his assumption of authority without any limitation involved the endorsement of his acts.

84 The pl'ff took the benefit of all he did, and they are equally bound by all he said or did while procuring those benefits.

We object to the finding that he did not intend to make any statement covering the lease which was untrue, or to deceive or mislead def'ts, or any of them, and his statements were rather in the nature of an assent or non-denial of statements made by C. & B. in his presence; whereas the evidence shows that he lead Murphy to believe, and intended he should understand, that the business of Crockwell & Bassett was not only a prosperous one to that date, but that it was settled, and a new and better business was about being entered upon, and it now appears, by his statements that there had been only an examination of accounts showing that the firm was probably solvent if their assets should turn out as well as they appeared; that he knew that C. & B. had no capital of their own, and

that he deliberately, by false statements, that had only the appearance of truth at the time, induced Murphy to believe that C. & B. were perfectly safe, when he was bound in fair dealing to disclose their real condition, on the inquiry made of him, and tell him the facts, and that he concealed the facts which he was bound to disclose, and knowingly led said Murphy and Streeper to believe in a condition of the business which he knew was contrary to the truth,

85 and that it appears that he did not act from a real belief that C. & B.'s condition was good, but that in anticipation of a fall in the price of goods he was seeking to get a contract relying on the sureties to it, out of which the plaintiff could realize benefits, while the def'ts were to suffer, and that his conversations and statements were intended for the benefit of his principal, and enabled it fraudulently to procure a contract known by him, and it to be based on wilful, deliberate misrepresentations, both as to Crockwell & Bassett and the said sureties.

We also except to the finding that the agent had no such apparent authority as should induce the defendants to rely on his statements; whereas the evidence shows that while he made some or all of his contracts subject to ratification, so far as they related to something to be done in the future, that so far as anything was required to be done by way of settling or closing up any part of the business, he did all without reference to his principals. If he had no authority in reference to the bonds or the old contract, his duty was to have said so, and not have so answered as to lead the def'ts to treat him as having authority, then assert that he acted without authority.

To the conclusions of law:

To the first conclusion of law, that the non-payment of the several sums found owing by Crockwell & Bassett constitute breaches of the bond sued on, for which all def'ts are liable, on the ground

86 that the sum is erroneous, in this: That the first breaches found are upon accounts for goods sold and delivered more than two years prior to the commencement of this action; that the cause of action is the account in case, and that the same was barred by the statute of limitation.

2nd. To the second finding of law, for the reason that two of the alleged breaches of the bond are assigned upon account for goods sold, as stated in the last exception, and are barred by the statute, and constiute no breach of the bond.

3rd. To the 3rd finding of law, because the evidence shows that the def't Streeper and Murphy were released from the bond sued on, both by declarations made to them and by acts which estop the pl'ff from enforcing any liability which might have existed.

4th. To the fourth finding of law, that the pl'ff is entitled to a judgment against either of said sureties, on the ground that the evidence shows that both have been realized from any and all liability, and because no liability ever, in fact, did occur on said bonds.

SUTHERLAND & McBRIDE,
Att'ys for Def'ts named.

(Endorsed:) District court, third jud'l dist. Utah Territory. No. 4099. Victor Sewing Machine Company *vs.* Crockwell *et al.* Exception to the findings. Filed July 10th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

87 District Court, Third Judicial District, Territory of Utah, Salt Lake County.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GRENIG, & EDMUND H. MURPHY, Defendants. } 4099.

This action having been referred to E. T. Sprague, Esq., to hear, determine, and report a judgment, and the referee having filed his report herein, now on motion of plaintiff's atttorneys it is considered and adjudged that the plaintiff have and recover of and from the defendants the sum of three thousand dollars, and also the costs and disbursements of the action taxed at one hundred and sixty-one and $\frac{60}{100}$ dollars, making the sum of $3,161\frac{60}{100}$, and that plaintiff have execution therefor. Dated July 10th, 1882.

By the court:

JOHN A. HUNTER, *Judge.*

(Endorsed:) 4099. District court, 3rd jud'l district. Victor Sewing Machine Co. *vs.* George W. Crockwell *et al.* Judgment. Filed July 10th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

88 *Notice of Intention to Move for a New Trial.*

In the District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Pl'ff,
vs.
GEORGE W. CROCKWELL *et al.*, Def'ts.

To Pl'ff, and to BENNETT & HARKNESS, *Its Attorneys:*

You are hereby notified that the def'ts, W. H. Streeper and E. H. Murphy, intends to move for a new trial and to vacate and set aside the findings and judgment heretofore reported to the court by the referee herein on the following grounds: Insufficiency of the evidence to justify the findings and judgment, and that the same and each of them is against law.

SUTHERLAND & McBRIDE,
Said Def'ts' Att'ys.

(Endorsed:) District court, 3d jud'l district, Utah Territory. No. 4099. Victor Sewing Machine Company *vs.* Crockwell *et al.* Notice of intention to move for a new trial.

89

Stipulation.

District Court, Third Judicial District, County of Salt Lake, Territory of Utah.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., DANIEL GRENIG, WILLIAM H. STREEPER, & EDMUND H. MURPHY, Defendants. } No. 4099.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., DANIEL GRENIG, & EDMUND H. MURPHY, Defendants. } No. 4197.

Statement for motion for new trial in behalf of the defendants, William H. Streeper and Edmund H. Murphy, in No. 4099, and in behalf of the defendant, Edmund H. Murphy, in No. 4197.

These two cases were referred to E. T. Sprague, Esq., to hear, determine, and report a judgment. The cases were tried together, it being stipulated by counsel that all the evidence taken should apply to each case, so far as applicable thereto, and it [was] likewise stipulated by counsel for both parties that but one statement shall be made, and that the same may be used on motion for new trial, or
90 on any appeal by either party, in both cases, or in either case, accordingly as the party using the statement may have the occasion or wish to apply or use it.

The following is all the evidence given on the trial in both cases applicable to the exceptions to the findings or the errors assigned by said defendants as grounds of their motion. It is also stipulated that the exceptions to the findings of the referee, filed by the def'ts in each of these cases, shall become and be treated as part of this statement as an assignment of the particular errors relied on in the motion for new trial.

(Evidence omitted.)

We do hereby certify that the foregoing statement of the evidence and exceptions in the cases aforesaid is full, true, and correct, & the stipulations therein are agreed to.

SUTHERLAND & McBRIDE,
Def'ts' Att'ys.
BENNETT & HARKNESS,
Pl'ff's Att'ys.

I hereby certify that the above is a true statement of the evidence & exceptions on appeal.

JOHN A. HUNTER,
Judge, &c.

91 District Court, Third Jud'l Dist. of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Pl'ff,
vs.
GEO. W. CROCKWELL *et al.* } No. 4099.

Now on this day come the def't E. M. Murphy and W. H. Streeper, and on the statement and records on file moves the court for a new trial and vacation of the judgment and findings herein, and the same having been submitted to the court, it is ordered that said motion to set aside the findings and judgment herein against the def'ts above named and for new trial be, and the same is hereby, overruled, it appearing that there is no error in same and no sufficient reason for granting the same.

July 10th, 1882.

(Endorsed:) District court, 3d jud'l dist., Utah Territory. No. 4099. Victor Sewing Machine Company *vs.* Crockwell *et al.* Order overruling motion for new trial. Filed July 10, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

92 *Notice of Appeal.*

District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Pl'ff,
vs.
GEORGE W. CROCKWELL *et al.* } No. 4099.

Please take notice that the defendants, William H. Streeper and E. H. Murphy, in the above-entitled action, hereby appeal to the supreme court of the Territory of Utah from the judgment therein made and entered in the district court of this district on the 10th day of July, 1882, and from the whole thereof, and from the order therein made denying the said deft'ts' motion for a new trial, and for setting aside the findings of the referee.

SUTHERLAND & McBRIDE,
Att'ys for said Def'ts.

To the clerk of said district court and
BENNETT & HARKNESS, *Pl'ff's Atty's.*

(Endorsed:) 4099. 3d district court, Utah Territory. Victor Sewing Machine Company *vs.* George W. Crockwell *et al.* Notice of appeal. Received copy of the within notice of appeal on time this 22d day of Aug., 1882. Bennett, H. and K., pl'ff's att'ys. Filed Aug. 22, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

93 In Supreme Court.

TUESDAY, *January 9th, A. D.* 1883.

VICTOR SEWING MACHINE CO., Respondent,

vs.

GEORGE W. CROCKWELL *et al.*, Appellants.

From 3d Dist.

This cause, coming on regularly for hearing, was argued by Mr. McBride, for appellants.

WEDNESDAY, *January 10th, A. D.* 1883.

VICTOR SEWING MACHINE CO., Respondent,

vs.

GEORGE W. CROCKWELL *et al.*, Appellants.

From 3d Dist.

This cause was further argued by R. Harkness, for respondent, and J. G. Sutherland, in reply, submitted, and taken under advisement.

WEDNESDAY, *April 9th*, 1884.

A session of the supreme court of Utah Territory was held this day, beginning at one (1) o'clock p. m., pursuant to adjournment.

Present and presiding, Hon. John A. Hunter, chief justice; present also, Hon. S. P. Twiss, associate justice, the clerk, marshal, and members of the bar.

Court was duly opened.

94 VICTOR SEWING MACHINE COMPANY, Respondent,

vs.

GEORGE W. CROCKWELL *et al.*, Appellants.

From 3d Dist.

This cause having been argued and submitted at a former term, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed; and further, that respondent have and recover of and from appellant seventeen & $\frac{75}{100}$ dollars, costs.

FRIDAY, *June 13th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

THE VICTOR SEWING MACHINE COMPANY, Respondent,

vs.

GEORGE W. CROCKWELL *et al.*, Appellants.

From 3d Dist.

It appearing to the court that the appellant, Edmund H. Murphy,

has died since the final judgment herein entered on the 9th day of April, 1884, and that Rhoda Murphy has been duly appointed and qualified as administratrix of the estate of said appellant, and
95 is desirous of taking proceedings to appeal said cause to the Supreme Court of the United States, on motion of attorneys for appellant, Sutherland & McBride, now made, it is now ordered that said Rhoda Murphy be, and she is hereby, substituted for the said deceased as a party in said cause.

And said appellants, by their counsel, Sutherland & McBride, in open court, in presence of counsel of respondent, pray for the allowance of an appeal from the judgment of this court to the Supreme Court of the United States, and that the amount of the bond, to stay proceedings on the judgment, be now fixed; and the court, after considering the same, allows said appeal, and requires that the appellants herein give a good and sufficient undertaking, to be approved by the chief justice of this court, in the sum of $5,000.00, and thereupon all proceedings shall be stayed in this action until the hearing of said appeal.

96 Know all men by these presents, that we, Charles Auer, A. Gould, and Howard Sebree, all of Salt Lake county, in the Territory of Utah, are held and firmly bound unto the Victor Sewing Machine Company, its successors and assigns, in the just and full sum of five thousand dollars, lawful money of the United States, to be paid to the said Victor Sewing Machine Company, its successors and assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of June, A. D. 1884.

Whereas lately, at a term of the supreme court for the Territory of Utah, in a suit depending in said court between the Victor Sewing Machine Company, as plaintiff, and George Wallace Crockwell, Charles Henry Bassett, Jr., William H. Streeper, Daniel Grenig, and Edmund H. Murphy, as defendants, a final judgment was rendered by said court on the — day of April, A. D. 1884, affirming a judgment of the district court of the third judicial district of said Territory against the said defendants for the sum of three thousand dollars and costs, amounting to one hundred and sixty-one $\frac{60}{100}$ dollars, *costs*, together with the costs of said supreme court, amounting to —— dollars, and the said William H. Streeper and Rhoda Murphy, the duly appointed administratrix of the estate of Edmund
97 H. Murphy, who has died since the entering of said judgment, defendants having prayed and been allowed an appeal from said judgment of affirmance, and the costs thereof, to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such, that if the said appellants shall prosecute their appeal to effect, and answer all damages and costs and pay, and cause to be paid, the amount of any judgment which may be entered against them in case said appeal shall fail to be made good, and said judgments be affirmed, or to the extent to which it shall be affirmed, or in case said appeal shall be

dismissed, then this obligation to be void; otherwise, to be and remain in full force and effect.

CHARLES AUER. [SEAL.]
A. GOULD. [SEAL.]
HOWARD SEBREE. [SEAL.]

Supreme Court of Utah Territory.

THE VICTOR SEWING MACHINE COMPANY, Plaintiff and Respondent,
vs.
GEORGE WALLACE CROCKWELL *et al.*, Defendants and Appellants.

I hereby approve the foregoing bond on appeal to the Supreme Court of the United States, and certify the same to be good and sufficient as a supersedeas in said action.

June 16th, 1884.

JOHN A. HUNTER,
Chief Justice.

98 Know all men by these presents, that we, Howard Sebree, Charles Auer, and A. Gould, of the county of Salt Lake and Territory of Utah, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and aministrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of June, A. D. 1884.

Whereas lately, at a term of the supreme court of Utah Territory, in a suit depending in said court between the Victor Sewing Machine Company, as plaintiff, and George Wallace Crockwell, Charles Henry Bassett, Jr., William H. Streeper, Daniel Grenig, and Edmund H. Murphy, as defendants and appellants, in said court, judgment was rendered on the — day of April, 1884, affirming a judgment theretofore entered in the district court of the third judicial district of Utah Territory against said defendants for the sum of three thousand dollars and one hundred and sixty-one $\frac{6\,0}{1\,0\,0}$ dollars costs, together with the costs of said Supreme Court, amounting to —— dollars; and the said William H. Streeper and Rhoda Murphy, the duly appointed administratrix of the estate of Edmund H. Murphy, who has died since the entering of said judgment, having prayed and been allowed an appeal from said judgment of affirmance, and the costs thereof, to the Supreme Court of the United States to reverse the judgment aforesaid:

99 Now, the condition of this obligation is such, that if the said appellants shall well and truly pay, or cause to be paid, to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him as clerk aforesaid and chargeable to the said appellants in the prosecution of said appeal, then the above obligation to be void; otherwise, to remain in full force and effect.

HOWARD SEBREE. [SEAL.]
CHARLES AUER. [SEAL.]
A. GOULD. [SEAL.]

I, John A. Hunter, chief justice of the supreme court of Utah Territory, do hereby certify that the foregoing obligors are well known to me to be amply responsible for the amount specified therein.
Dated June 16, 1884.

JOHN A. HUNTER,
Chief Justice.

Stipulation.

Supreme Court Utah Territory.

THE VICTOR SEWING MACHINE COMPANY, Pl'ff and Respondent,
vs.
GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GRENIG, and EDMUND H. MURPHY, Def'ts and Appellants.

It is hereby stipulated by and between the counsel of the respective parties above named and in said action that the appellants
100 having procured the allowance of an appeal to the Supreme Court of the United States from the supreme court of Utah Territory, the issuance and service of a citation is waived.
Dated June —, 1884.

BENNETT & HARKNESS,
Att'ys for Pl'ff and Appellee.

———— ————,
Att'ys for Appellants and Defts.

Stipulation.

Supreme Court of the United States.

GEORGE WALLACE CROCKWELL, CHARLES H. BASSETT, Jr., WILLIAM H. STREEPER, DANIEL GRENIG, and RHODA MURPHY, Administratrix of Edmund H. Murphy, Dec'ed, Appellants,
vs.
THE VICTOR SEWING MACHINE COMPANY, Appellee.

In this action the original parties defendant, except William H. Streeper and Rhoda Murphy, administratrix of Edmund H. Murphy, deceased, having declined to appeal from the judgment of the court below, it is agreed by the appellee, by its attorneys herein, that this appeal may be heard without objection to their joinder in this court.

BENNETT & HARKNESS,
Att'ys for Appellee.

101 *Stipulation.*

Supreme Court of the United States.

WILLIAM H. STREEPER and RHODA MURPHY, Administratrix of the Estate of Edmund H. Murphy, Deceased, Appellants,
vs.
VICTOR SEWING MACHINE COMPANY, Appellee.

We hereby stipulate that the foregoing is a full, true, and correct transcript of the record in said action in the supreme court of Utah

Territory, and of the proceedings therein, save and except the testimony contained in the statement therein filed, which, being immaterial in this appeal, is omitted by consent. We further stipulate that the parties to this appeal to the Supreme Court of the United States from the judgment rendered herein will submit the same for decision on briefs, waiving oral argument, at the October term, 1884.

C. W. BENNETT,
Counsel for Appellee.

102 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, E. T. Sprague, clerk of the supreme court of Utah Territory, in pursuance of the appeal in said action from the judgment and decision of said supreme court in the cause entitled "Victor Sewing Machine Company, plaintiff and respondent, *vs.* George W. Crockwell *et al.*, defendants and appellants, No. 4099," to the Supreme Court of the United States, do herewith transmit to said Supreme Court of the United States the foregoing transcript of the record and proceedings therein as they are found on file and of record in my office. And I do hereby certify that the foregoing transcript of said record aad proceedings, supersedeas bond, bond for costs, stipulation waiving citation, and the other stipulations as to said transcript, record, & proceedings by the counsel therein, are full, true, and correct.

Witness my hand and the seal of said supreme court of Utah Territory, this 15 day of September, A. D. 1884.

[SEAL.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

103 The appellants made the following assignment of errors. (No. 4099):

First.

The complaint is insufficient to support the judgment rendered or any judgment in favor of the plaintiff, because—

1st. The two first causes of action set forth in complaint for damages for a failure to pay for goods consigned and delivered contain no allegation of the value of the good either by the article or in the aggregate.

2nd. Because in the two last causes of action set forth in the complaint no breach of the bond is shown which affects the sureties.

3rd. Because there is no allegation in the complaint that the sureties on the bond ever had any notice of the default alleged as the basis of their liability, or the amount of the liability before suit [was] brought, and such motion is indispensable to a recovery by plaintiff.

Second.

On the facts found in this case the judgment should have been for the defendants on all the causes of action alleged, because—

1st. The first and second causes of action were each barred by the statue of limitations; and

104 2nd. Because no breach of the bond on the part of the sureties was found shown as to either of the other grounds of action alleged.

Third.

Upon the *the* found judgment on the causes of action third and fourth for failure to pay the guaranteed notes and the personal notes of Crockwell & Basset is erroneous, because—

1st. No liability is shown if any breach occurred, because the sureties had no notice; and

2nd. The pl'ff was estopped by its acts and conduct from any recovery against the sureties.

Fourth.

The facts found constitute an estoppel of the plaintiff as against the sureties.

Fifth.

The conclusions of law are, all and each of them, unsupported by the facts found, and the defendants were each entitled to a judgment in their favor.

SUTHERLAND & McBRIDE,
Att'ys for Appellants.

Endorsed on cover: Utah Territory supreme court. No. 950. William H. Streeper, & Rhoda Murphy, administratrix of Edmund H. Murphy, deceased, appellants, *vs.* The Victor Sewing Machine Company. Filed 23rd September, 1884.

112-676

DEC 9 1884
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 950.

WILLIAM H. STREEPER AND RHODA MURPHY, *Administratrix*, APPELLANTS,

vs.

VICTOR SEWING MACHINE CO., APPELLEE.

No. 951.

RHODA MURPHY, *Administratrix, etc.*,

vs.

VICTOR SEWING MACHINE CO.,

STATEMENT, ASSIGNMENT OF ERRORS, AND ARGUMENT FOR APPELLANTS

By J. G. SUTHERLAND and
JOHN R. McBRIDE,
Attorneys for Appellants.

Star Steam Print.

WILLIAM H. STREEPER AND
RHODA MURPHY, *Administratrix*,
APPELLANTS,

vs.

VICTOR SEWING MACHINE CO.,
APPELLEE.

No 950

Original File No. 4099.

RHODA MURPHY, *Administratrix, etc.*,
APPELLANT,

vs.

VICTOR SEWING MACHINE CO.,
APPELLEE.

No 957

Original File No. 4197.

PRELIMINARY.

These two cases brought by the same plaintiff in the trial court and having the same defendants with a single exception, were both actions upon bonds of indemnity, and while based on separate instruments, involved the same facts, and nearly the same questions of law.

They were tried together below before a referee and by stipulation the testimony taken in the one hearing was made applicable to each case so far as relevant. The findings were made nominally in each case, but the entire findings having any bearing on either, are findings for each.

There is but a single point in the second case differing from the first and save as to that, the conclusions arrived at upon the first, will be decisive of the last.

To prevent confusion the cases will be argued in their order, applying in the last case all that has gone before which may be applicable.

In referring to the cases we preserve the file No. of each as the record of the inferior courts has heretofore done so.

STATEMENT OF FILE NO. 4099. No 950

The action is upon an indemnity bond.

The plaintiff filed its complaint against the defendant in the court

below—the District Court of the Third Judicial District of Utah Territory—on the 12th of June, 1879.

To this complaint the defendants Crockwell and Bassett filed a separate answer as principal defendants, and Streeper and Murphy together, filed their answer, as the sureties in the instrument sued upon. Upon the issues made by these pleadings, the action came to a hearing before the court and a jury on the 18th day of May, 1880; and at the trial, on motion of the defendants' counsel after the plaintiff had submitted its case, the court ordered a judgment of non-suit against the plaintiff.

From this judgment the plaintiff took an appeal to the Supreme Court of the Territory of Utah, where the judgment of the District Court was affirmed. (2 Utah Rep., p. 557.)

The plaintiff under a rule of court filed its petition for a rehearing, which being afterwards granted, the court by a majority of the judges vacated its former judgment of affirmance, reversed the judgment of the District Court, and remitted the case with directions to that court to grant a new trial. (West Coast Rep., vol. 1, p. 427.)

On its return to the District Court the cause was referred to a referee to try and report findings and judgment, and was so tried.

The referee having heard the testimony of the parties and taken the case under advisement on the 29th of June, 1882, filed his findings of fact and conclusions of law, and reported a judgment in favor of the plaintiff, for the sum of three thousand dollars and costs, and it was entered accordingly. Formal exceptions were filed to these findings and made of record, and thereafter the defendants appealed to the Supreme Court of the Territory. Final judgment of affirmance was entered in the said Supreme Court on the 14th day of April, 1884, and the defendant Murphy having died before that date, on the day of June, his administratrix was substituted, and this appeal is prosecuted by William H. Streeper and Rhoda Murphy, administratrix, to reverse the judgment so entered against them.

THE ISSUES IN THIS CASE.

The plaintiff is a corporation and engaged in the manufacture and sale of sewing machines, and a contract was made between plaintiff, acting by its agent, and the principal defendants, Messrs. Crockwell & Bassett, by the terms of which (see complaint) it was agreed that the plaintiff should furnish sewing machines to the defendants for sale on commisson, upon terms particularly specified. On the reverse side of

this contract sheet (which was on a printed form, with blanks filled to apply to these parties) was a printed form of bond, and the defendants Streeper, Murphy and Grenig, together with the principal parties Crockwell & Bassett, became obligors to the plaintiff in this bond, which seems to have been intended to secure the stipulations of C. & B. in the contract or agreement. This action is brought on the bond, and four several breaches of its provisions are alleged, or attempted to be alleged, in the complaint. The answers filed are separate—the principals Crockwell & Bassett pleading together, and the sureties Streeper and Murphy, filing a joint answer for themselves; Grenig the other defendant made default. The contract of Crockwell & Bassett, was dated June 28th, 1875, the bond was dated and executed July 3, 1875.

The judgment now on review was rendered on findings of fact and conclusions of law made by a referee of the District Court of the Third Judicial District of Utah Territory, and on the affirmance of that judgment by the Supreme Court of the Territory, as stated above. The findings of fact are not reviewable here for error, and the testimony is therefore omitted from this record as immaterial. The questions for review therefore consist of such errors affecting the judgment as arise upon the pleadings, and the conclusions of law drawn by the referee from the facts found, and reported by him.

The appellants make the following

ASSIGNMENT OF ERRORS. (No. 4099.)

FIRST.

The complaint is insufficient to support the judgment rendered, or any judgment in favor of the plaintiff, because—

1st—The two first causes of action set forth in the complaint for damages for a failure to pay for goods consigned and delivered, contains no allegation of the value of the goods either by the article or in the aggregate.

2d—Because on the two last causes of action set forth in the complaint, no breach of the bond is shown which affects the sureties.

3d—Because there is no allegation in the complaint that the sureties on the bond ever had any notice of the default, alleged as the basis of their liability, or the amount of the liability, before suit brought, and such notice is indispensable to a recovery by plaintiff.

SECOND.

On the facts found in this case the judgment should have been for the defendants on all the causes of action alleged, because—

1st—The first and second causes of action were each barred by the statue of limitations; and,

2d—Because no breach of the bond on the part of the sureties was found as to either of the other grounds of action alleged.

THIRD.

Upon the facts found judgment on the causes of action, third and fourth, for the failure to pay the guaranteed notes, and the presumed notes of Crockwell & Bassett, is erroneous, because—

1st—No liability is shown, if any breach occurred, because the sureties had no notice; and,

2d—The plaintiff was estopped by its acts and conduct from any recovery against the sureties.

FOURTH.

The facts found constitute an estoppel of the plaintiff as against the sureties.

FIFTH.

The conclusions of law are all and each of them unsupported by the facts found, and the defendants were each entitled to judgment in their favor.

BRIEF AND ARGUMENT.

First, as to the Sufficiency of the Complaint.

The most cursory examination of the complaint will suffice to stamp it as a most remarkable production. The pleader seems to be in a sort of a quandary, and, fearing to state his case explicitly, sought relief in generalities, which, we think, cannot be made to do duty for that plain and concise "statement of the facts constituting the cause of action" which the code (Section 1264 Comp. Laws of Utah, 1876,) requires.

Up to the point where the complaint seeks to allege the first breach of the bond, we may omit criticism of its contents. But when the vital point is reached, there is a rehearsal of the former allegations, which not only betrays confusion of mind in the pleader, but shows that his escape

from it was sought as one struggling in darkness, gropes for the light. The following is the attempt to state the first breach alleged: "On its information and belief said plaintiff alleges, that the condition of said bond was broken by said defendants in this: and said defendants failed to keep and perform the conditions of said bond, that said Crockwell & Bassett should well and truly keep and perform the said agreement in this, to-wit: "That on and by the fifth article or subdivision of said agreement, said Crockwell & Bassett, called therein the consignees, were each week to report to said plaintiff, called therein the consignor, all the sewing machines furnished by said plaintiff and sold by said Crockwell & Bassett, and remit the proceeds of such sales to said plaintiff; whereupon said plaintiff was to credit said Crockwell & Bassett as therein specified, and said Crockwell & Bassett were to be charged the difference between the amount remitted and the retail price of the machine or machines reported; said Crockwell & Bassett therein agreeing to remit to plaintiff such an amount as would equal the retail price of the machines reported sold (less the commissions therein provided), together with five per cent. of the retail price of all machines sold for notes in addition thereto; said five per cent. to remain with said plaintiff until the termination of said contract or agreement, and the payment of all notes taken under or pursuant to the same; and after deducting from said five per cent. the cost of collecting the notes therein mentioned, if any there were, and the payment of any cost and expenses of the settlement of that agreement, the said plaintiffs were to pay to said Crockwell & Bassett such portion of the above mentioned five per cent. reserve as should at that time be due to the said Crockwell & Bassett.

"That between the dates of July 3d, 1875, and February 10, 1876, said plaintiff, at the request of said Crockwell & Bassett, consigned and delivered to said Crockwell & Bassett, under and in pursuance of said agreement, *divers sewing machines*, which were by said Crockwell & Bassett, prior to the year 1878, sold by said Caockwell & Bassett; but said Crockwell & Bassett failed and refused, and still do fail and refuse, to remit or pay to said plaintiff the *proceeds of said sales*, or *so much thereof as said plaintiff is entitled to*, under said article or subdivision five of said agreement, to plaintiff's damage in the sum of $146.82 That the several sums of money which the said Crockwell & Bassett have so refused to remit or pay over *amount in the aggregate* to the sum of $146.82, a detailed and itemized account of which said sales showing the machines received from plaintiff, and sold by said Crockwell & Bassett, and the amounts remitted, *with proper credits thereon, and the amounts due* and

not remitted, as well as *the balance thereon now due* plaintiff, is hereto attached and marked Exhibit A, and made a part of this complaint."

Exhibit A, which is thus attached and made a part of the complaint is a statement of the "commission account" between the parties by plaintiff. The effect of its contents as a pleading we remark upon hereafter. The complaint, without it, even in the mind of the pleader, would seem to have been regarded as deficient. Whether it aids the formal allegations we shall see hereafter. We return to the complaint. The attempt by it is to state facts showing a breach of the conditions of the bond as a foundation for damages. Treating the rehearsal of the terms of the contract as surplusage, (the contract is already set out in full) the only effort in that direction is found in the sentence: "That between the dates of July 3d, 1875, and February 10th, 1876, the plaintiff at the request of C. & B., consigned and delivered to C. & B. *under this agreement*, divers sewing machines which were by C. & B., prior to 1878, sold, but C. & B. failed and refused to remit or pay to plaintiff the proceeds, *or so much thereof* as plaintiff was entitled to, under said article of said agreement to plaintiff's damage in the sum of $146.82.

The agreement states the proportion or share to which the plaintiff and defendants were to be respectively entitled, but it *fixes no price and no value* on the machines. So that one indispensable element, that of price and value is neither found *in the agreement or in the pleadings:* Further, this action is claimed to be brought on the bond and agreement. It is a suit essentially to indemnify (under a specialty, agreeing so to do) the plaintiff against a particular loss. The particular facts constituting that loss are indispensable in such cases.

Bas vs. Steele, 3 Wash. cc., 381.
Stevenson vs. Smithe, 28 Cal., 102.
Cole vs. ~~Shutterson, 1~~ Hamilton, Cal., 51.
14 Wend., 159.
12 Wend., 64.
Coe vs. Rankin, 5 McLean, 354

The court must be able to see that the facts stated necessarily import damages, or there is nothing to try. It *does not* appear, from the allegation "that the plaintiff consigned these machines to defendants which were by them sold, and that they refused to pay all or the portion of the proceeds thereof to which plaintiff were entitled." How much was the plaintiff entitled to? is the first inquiry, but the pleading on this vital question neither states quantity or value. It does not even allege the total amount received for the goods as proceeds from which their value

might be deduced by inference (not allowable in a pleading) but the pleader is content with stating a conclusion of law, "*that under the agreement the plaintiff is damaged* in the sum ot $146.87."

Without a statement of the value of each machine consigned and sold, or of the aggregate value of all so consigned and sold, and not paid for, there is nothing from which the court can see what amount of damages has accrued.

The agreement shows what proportion or percentage of the proceeds the plaintiff was to have on sales of machines, but no price was fixed, and as proof is essential in such case of value, an allegation of value was indispensable to let in proof. This is a case for special damages and all facts showing the basis for recovery must be pleaded or no case is stated.

Stevenson vs. Smithe, 28 Cal., 103. And cases cited above.

Does the statement of account by the plaintiff (Exhibit A.) aid the complaint? It obviously does not, for the reason that *the account contains no averment of value.* This exhibit is referred to, not as an allegation of value but to show the account kept of the sales of plaintiff. It is not an account stated between the parties, but a history of the business and by no possibility can it be claimed that it is an allegation of value of these machines.

More than this: the statements in this Exhibit "A" are evidentiary, not ultimate facts. They are allowed as supplementary to allegations of the pleadings, not as allegations. They are evidence of the truth of ultimate facts stated in the pleadings—they are not admitted, even if not denied, and cannot be used as a means of supplying the ultimate facts not alleged, though such facts might be extracted out of them. In this instance it is not alleged that they contain the true price and va s machines, either separately or in the aggregate. If ~~any~~ fact s e exhibit ~~was~~ were stated formally in the pleadings as such, it wou e the objection.

So far the objection applies to the first cause of action stated in the complaint. When we come to discuss the findings of fact we will refer to this Exhibit "A" again.

DEFECTS IN STATEMENT OF SECOND CAUSE OF ACTION.

The same defects exists as to the complaint on the second cause of action.

This cause of action is upon an account called the "attachment account."

No price is fixed in the agreement or contract on these goods claimed to have been supplied, no value is alleged as as a fact, and the account attached to the pleading "Exhibit B" not purporting to be an account stated, or any allegation of value, furnishes no basis for any damages.

To say, as is done in this pleading, "that the said several sums of money which said Crockwell & Bassett were to pay the plaintiff amount in the aggregate to $87.97—a detailed and itemized account, showing the parts of machines and attachments so furnished, and the amounts paid plaintiff therefor, and showing the *amounts which should have been paid but were not paid*," with the amount due, is an averment of no pleadable fact. It is a mere conclusion of law, so far as it is anything, and is totally wanting in the statement of the *fact of value and price*. Such a pleading is worthless for the purpose of laying a foundation for damages.

Schenck vs. Naylor, 2 Duer., 676.
Wilson vs. Clarke, 20 Minn., 369.
People vs. Bassett, 4 Wend., 570.
Julliand vs. Burgott, 11 Johns, 6.

The allegation of a probative fact, no matter how strong its tendency to show the ultimate fact, is insufficient in pleading.

Stringer vs. Davis, 30 Cal., 518.
30 Cal., 570.
Harris *et. al.* vs. Hillegass, 54 Cal., 463.

Matters of evidence, though stated in the pleadings, are not thereby made material. The thing to be alleged in this case as a basis of damage, was the value (stipulated on market) of the goods and an account which gives the date and quantity, memorandum of sales with balances, does no more than present evidence tending in that direction. It is no more than evidence, and without other additional evidence preliminary to it, would not be receivable at the trial if objected to—even if the allegation of the ultimate fact were made. As these two first causes of action are liable to another objection, besides those urged to their sufficiency, to avoid returning to them, we present it at this point.

It is not controverted that these accounts arose between July, 1875 and February 10, 1876—more than two years prior to the commencement of the action by the plaintiff. The defense of the bar of the statute is pleaded in the answers and there is no dispute as to the facts. (See second and third findings of fact. Comp. L. of Utah, 1876, Sec. 1111, Chap. III.) The only question then is: Does the liability of the defendants arise on the *account* for goods sold and delivered, or not? If

the answer be in the affirmative, then the action on these two first counts in the complaint fails. We insist that the action is based primarily on the account. The Supreme Court of Utah, in the majority opinion granting the plaintiff a new trial, resulting in this judgment, after conceding that the agreement and bond sued on, furnished no cause of action, still hold that the suit was not barred. It said: "The contract was not, and was not intended to be a consignment of machines and attachments, *and no indebtedness was created* on the part of Crockwell & Bassett by *its execution and delivery.*" #This being conceded we respectfully ask, if that contract and bond created no indebtedness, how did they become the cause of action? The fact is, the cause of action was created afterwards by the delivery of the property, and the existence of the liability created by that delivery.

The bond was given to secure the payment of the account thus created and its whole efficacy depends on the creation and existence of this account.

The moment the account was created the liability begun, the moment the account ceased to exist, either by its being paid by C. & B, or by being barred by lapse of time, the liability ceased. The bond is not the "*cause*" of action—it furnishes the measure of the liability in the action. It was given, by its own terms, to secure "book accounts," and if these book accounts were paid, discharged, or barred, then the liability on the bond no longer existed.

The plaintiffs insist that the cause of action is on the bond.

That this is not so is evident from the fact that the allegation of a breach and a production of the bond would not entitle the plaintiff to judgment. This is the conclusive test. The bond sued on in this case is entirely collateral to the real cause of action, and that is shown by the fact that the plaintiff instead of confining himself to a breach of the bond alleges a series of collateral facts (or attempts to do so) viz: the delivery of goods and non-payment for them.

If the plaintiff had brought suit on the account which it claims was not paid, and had recovered judgment and its money, could it afterwards recover on the bond? Certainly not, because no cause of action would have remained. The payment of the account would have been an extinguishment of the liability. Is there any difference between an actual payment and an extinguishment of the claim by operation of time? We can perceive none. The real question is: Does the cause of action exist, or does it not? The court below held that the account though barred by the statute, was still in existence, because the bond given to secure its

West Coast Rep. Vol. 6. P. 427

judgment was in writing and was not barred. This ruling finds no support and is in defiance of express adjudication.

Clarke vs. Figes, 2 Stark, 234.

In the case of Jackson vs. Sackett, (7 Wend., 98), it is said: "The principle is perfectly well established that the mortgage is but an incident to the debt. It passes by an assignment of the bond or a transfer of the note or other evidence of the debt; it cannot be separated from it, *and payment of the debt per se* annihilates the mortgage. If the mortgagee or his representatives had brought their action upon the note in this case to recover the debt, a plea of the statute of limitations would have been a perfect defense. (It is admitted here, if the suit had been on the account against Crookwell & Bassett, their defense would have been perfect). Why should they be permitted to deprive the defendants of the benefit of of that statute by varying the form of the action (by bringing suit in our case on the bond) and seeking to recover the land itself which was pledged, mortgaged, merely by way of security for the debt, and as an incident to it? The statute of limitation is founded in part at least, perhaps I might say principally, upon the presumption of actual payment, and the difficulty of proving it from lapse of time. It appears to me that when the form of the action prevents the defendant from availing himself of the statute by way of plea, he should have the benefit of it, etc."

The principle that when the cause of action is barred, the collateral security given to insure its payment is discharged, is elementary and though sometimes discussed, the decisions are uniform. While it is seen that in some of the states mortgages are not held to be merely an incident of the debt secured by them, and hence not within the principle laid down in the case cited, yet whenever the instrument sued upon is collateral to the substantive cause of action there is no controversy as to the rule.

Brandt on Suretyship, Sec. 121 to 124, inclusive.

Two cases decided by the Supreme Court of Ohio are directly in point.

State vs. Conway *et al.*, 18 Ohio, 234.
State vs. Blake *et. al.*, 2 Ohio Stat., 147.

These cases if rightly decided are conclusive of the present one. The last case cited was a suit brought on an official bond of a public officer. "The breaches alleged," says the court in the opinion, "consist of

a great number of misfeasances and nonfeasances in the discharge of official duties, resulting in injury to the county. To some of these breaches the defendants pleaded the statutes limiting actions against officers to one year. This plea being demurred to by the plaintiff, presents the single question whether it constitutes a plea to the action. It is not doubted that this precise question was made and decided affirmatively in the case of the State etc., vs. Conway, Ohio, 284, but the correctness of ~~strict~~ the ruling is denied."

"We have again carefully examined the subject, aided by the able and thorough discussion of counsel, and a majority of this court are of opinion that the law was correctly settled by our predecessors."

The opinion proceeds to add to the reasoning in the former case, and to hold that although a suit on a bond was not barred for fifteen years from the date of liability, that when the bond *was collateral to the cause of action*, whenever *that cause of action* was barred, the liability on the bond ceased, and concluded that the plea was good. The parallelism between this case and the one at bar is complete. The execution of the bond in the reported case, and of the bond sued on in this case created no liability *per se*. Its legal effect depended upon the happening of other events. In the reported case, on the doing of certain things provided against in the bond, in the case at bar, in the making of an account and failure to pay it.

In both cases the bond sued on, would not be barred by statute for years, after proceedings directly for the injury done, and on the debt contracted, would each be barred.

The court held that the "cause of action," on the bond, was the injury done to the county by the misfeasance of the officer, the cause of action here, is the nonpayment of the account of C. & B.

The court in Ohio held that the right to proceed on a bond, though the *bond itself would not be barred* for fifteen years, terminated when the direct right to sue the principal for the injury, was barred, which was one year.

If these cases are good ~~in~~ law, then our construction is clearly right.

We cite in addition the following cases sustaining the same view.

Couch vs. Waring, 9 Conn., 261.

Sims vs McClay, 14 Iowa, 284.

Dawes vs. Shedd, 15 Mass., 6.

The real question is: What is the cause of action upon which this suit is brought?

The plaintiff contends it consists in the breach of the bond, and that the bond being in writing the obligation continues four years from the date of the breach complained of.

But the fact is that the cause of action consists in the alleged non-payment of the two accounts for goods delivered.

The bond created no liability. Unless something else was done no indebtedness could ever occur. It was only when an account was created and not settled, that the liability arose. This was conceded by the court below in its opinion, and yet it with inexplicable inconsistency added that "the accounts annexed to the complaint for machines and attachments sold are not the basis or meritorious cause of action, but only a manner of ascertaining the amount of indebtedness.

We respectfully submit that this deduction precisely reverses the true legal condition of the case.

Under the agreement C. & B. did not agree to buy, nor did the plaintiff agree to sell or consign one dollars worth of goods. It was an agreement that if the defendants C. & B. should order goods; and plaintiff should see proper to consign them, the consignees should pay for them "on account," at certain percentages—no scale of prices even being fixed, only the commissions on prices afterwards to be fixed. All that the contract did, was to furnish the rule or measure of compensation, in case an account was made. Because the contract under which this account arose furnished the basis of a settlement of the account, it is denied that a failure to pay the account made it the "cause of action." It is this position which was so thoroughly answered in the Ohio and other cases.

It may well be asked how could a contract which created no indebtedness become a meritorous or any "*cause of action?* The "*cause of action*" was created subsequent to the bond and contract, and if so, certainly they are not, and the ~~suits~~ accounts alone are, the "cause of action."

If for instance the account had been paid, no one would contend that any cause of action could have arisen on the bond, if it was not paid, then a cause of action arose on the bond? no; but on the cause of action the accounts. This was in the contemplation of the parties, for the bond was given to secure "book accounts," as these were— in terms—as well as notes—and other obligations. If the notes and other obligations were barred by lapse of time and the breach alleged was non-payment of them, then the cause of action would be barred, though the bond—a sealed instrument—might not be. It seems to us that the error of the court on this point is palpable.

To return to the first proposition that no cause of action is stated in the complaint:

We insist that the sureties by entering into this bond that C. & B. should "*guarantee*" all notes of third parties purchasing machines of the plaintiff through them as consignees, and "*give*" their own notes—when those of third parties were not taken—to plaintiff for machines sold, does not bind the sureties for the payment of either, or any of their obligations. The doctrine is fundamental that the obligation of a surety is not to be extended by implication, and that a surety has the right to stand strictly on the terms of his agreement.

Until the duty to cause another "*to guaranty*," can be turned into an obligation to pay and the duty to cause ~~and then~~ them "*to give*" a note can be turned into a duty to do something more and further; the obligation is limited by what is written.

The appellee seeks to add other conditions to the bond by implication, but it is the doctrine of construction by implication "run to seed" to hold that an agreement to cause A to "guarantee" and "give" notes is an agreement by the obligee as surety that "A" and the surety will pay them.

In Miller vs. Stewart, 9 Wheat., 702-3, Judge Story says:

"Nothing can be clearer upon both principle and authority than the doctrine that the liability of a surety is not to be extended by implication beyond the *terms* of his contract. To the extent and in the measure and under the circumstances pointed out in his obligation he is bound, and no further. He has a right to stand on the *very terms of his contract*."

In Leggett vs. Humphrey, 21 Howard, 76, the court in passing the point here involved said:

"The principle which limits the liability of the surety inheres intrinsically in the character of his engagement. He does *not undertake to perform the acts* or duties *stipulated by his* principal, and would not be permitted to control their performance."

While the principals on this bond may be held *by their indorsements of these notes*, to pay them, the engagement of the sureties was only to the effect that the principals should "guaranty" one class of notes, and "give" their own in another class of cases, and these things it is admitted have been done. We cite, in addition to the cases above, the following:

Martin vs. Thomas, 24 How., 315.
United States vs. Boyd, 15 Pet., 208.

McClusky vs. Cromwell, N. Y., 598.
McMicken vs. Webb, 6 How., 296.
Smith vs. United States, 2 Wall., 235.
United States vs. Cheeseman, 3 Sawyer, 424.
Hamither vs. Van Reusselaer, 43 N. Y , 244.
Meelick vs. Knox, 44 N. Y., 676.
Caine's cases in error 2, 1.

The distinction between the liabilities of the principals and sureties is clearly pointed out in some of these cases, as well as the extent of the obligation of the surety, and we submit them as conclusive of the point in issue.

The Findings against the Pleadings and Record.

The findings in this case will attract special attention for other reasons than those already presented.

They are most technical and complete in points not controverted, and most ob-cure on points where precision is essential, while on vital issues they are entirely silent, or contradict the pleadings. As an instance of the latter we direct attention to the issue joined on the first cause of action—the claim for $146.97—on the commission account.

The contract under which this account was made and this suit brought, was superseded in March, 1876. Turning to the condition of that account (see Exhibit A attached to the complaint) on the last day of March, 1876, we find that *the balance in favor of the defendants, by plaintiff's own account, in its complaint*, was forty dollars and fifty-five cents!—(See item March 31, 1876.)

We find further that while this contract sued on had been superseded in *March*, 1876, the plaintiff, to force a balance in its own favor, on the 10th of May, 1876, *after the contract was superseded*, according to the findings, as well as the fact, charged the defendants up $95.00 on certain notes of one B. Morris, which they say they had returned on that date to C. & B.; and the plaintiff actually carries on this account, charging C. & B. with a "reconsigned" machine on the 14th of September, 1876, five months after the contract had entirely ceased! and these two charges (except costs of collecting some notes) are the items which compose this balance demanded. Let the account be used as evidence—and no more can be claimed for it than this—it shows that the allegation that the defendants owed the plaintiff on account of goods sold and delivered between June, 1875, and February 10, 1876, is untrue, and if the account is re-

garded as part of the pleading, then the finding is against the pleading, as well as the admission in the exhibit.

If any attention had been given to this part of the case, whether the exhibit be treated as legitimate pleading, or as a solemn admission made in the record, such a ruling or finding of facts could not have been made. The finding is a contradiction of the complaint, treating the exhibit as a part of it, and a contradiction of a record admission of the plaintiff if the exhibit is only treated as evidence. In either event the finding must be disregarded. It is observable that while the plaintiff charges the default of the defendants, C. & B., to have been between June, 1875, and February, 1876, the account (Exhibit A) is rendered up to July, 1877; and although the contract ceased in March, 1876, the *debit balance* is made up *afterwards;* and while, by the findings, the business was being carried on under a different contract, that of March, 1876. The plaintiff was sued for a balance under the contract of 1875, appends one exhibit that shows a default, if any there be, in 1876, while the business was conducted under another agreement, and this one was not in existence!—in other words, the complaint showed that the default occurred *after* the contract had been abrogated. A finding of damages by the referee is therefore a finding against the pleadings and against the record.

The Findings on the Fourth Assignment of Error.

The sureties are discharged from liability by the acts of the plaintiff.

The Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth findings of fact, when fairly interpreted and construed, end in this:

That in March, 1876, the contract under which the damages in this action are alleged to have occurred, was superseded by a new contract between the plaintiff and Crockwell & Bassett—that pending the negotiations about the new contract, the appellants, Streeper and Murphy, having been solicited to again become the sureties of C. & B. on the proposed new contract, each of them made inquiries of the plaintiff's agent (who was the party who negotiated both contracts, and finally "closed" business in November, 1876) about the condition of it. That V had looked over the accounts and knew their condition, and told that Crockwell and Bassett had done well, that the past business was satisfactory to the plaintiff, and it was about to give them a new contract under which they would get larger profits and have better oppertunity to make money

To Streeper, who went to the office of Crockwell & Bassett, and who

was solicited to likewise become a surety in the new contract, the plaintiff's agent Wilkinson, said, *in answer to Streeper's inquiry*, if he was now relieved or released on the bond given to secure the contract sued on, "that he, Streeper, had nothing to fear on that—and made an affirmation of such a character as led Streeper to understand that he was no longer liable." In November, 1876, the plaintiff terminated the business of selling machines through Crockwell & Bassett and made an arrangement to carry it on, with one Conrad Wilkinson.

Murphy having become a surety under the contract of March, 1876, between plaintiff and Crockwell & Bassett, heard of this change of the business in November after, sent for Wilkinson, plaintiffs' agent, in order as the referee finds, to ascertain "how the bondsmen of Crockwell & Bassett stood" and the agent then told him "that, so far as the boys have acted (Crockwell & Bassett) they could not do better (could not have done better); everything is satisfactory, the business has been turned over to another party, and everything is agreeable."

Murphy—If that is the case then, the bondsmen have nothing further to bother about?

Wilkinson—No, everything is satisfactory, and the business has been turned over.

"From these two conversations Murphy got the impression that he was released on the bond," says the referee in his finding.

These findings, which contain but the shadow of the facts upon which they rest, must at once arrest the attention of this court.

Instead of stating all the surrounding circumstances in order to show their full intent, as we were entitled to have them stated, we must be content with what we have thus grudgingly given by the referee, as in this forum we cannot review the evidence.

No pretense is made that between March, 1876, and the commencement of this action, the sureties ever had a hint from the plaintiff, that anything was wrong in the accounts of C. & B., or that they were regarded as liable on this bond.

The statute of limitations had fully run on the open account between plaintiff and C. & B., and in a few months would have barred all their unpaid notes, and guaranteed notes as well, when this action was commenced.

The complaint fails to show that any notice of the default of C. & B. was given to to the sureties, nor is it pretended that they had any notice until this suit was instituted.

This notice they were entitled to. The waiver of notice in the bond

is only a waiver of notice so far as C. & B. were concerned as guarantors and makers of the notes, and does not apply to the sureties.

That the appellants Murphy and Streeper were entitled to notice, we cite

Babcock vs. Bryant, 12 Pick. 1334.
Norton vs. Eastman, 4 Greenl. 521.
Illsley vs. Jones et al., 12 Gray, 264.
Raphael vs. Clark's Exec'rs, 7 Cr. 68.

The rule seems to be that whenever a liability is collateral or contingent, the surety is entitled to reasonable notice of the default. In this case the defaults of the principals occurred between July, 1875, and February, 1876, and no notice is pretended to have been given to the sureties until June, 1879. All the collaterals furnished by the defaulting debtors were held meanwhile and are retained to this day.

So that we have a case where sureties, misled by the plaintiff's statement that the business had been closed to their entire satisfaction, thus lulling them into inaction for their own indemnity, while the plaintiff was holding securities found by the referee to be *hundreds of dollars more in amount* than the defendants' debt, and after three years' time, and the loss of the collaterals, coming back to the sureties and demanding their "pound of flesh."

We respectfully insist that they cannot, in such a case, recover. Many of the cases hold that whenever the liability of the sureties is not for a fixed and certain sum, to be paid on default of the principal, no recovery can be had without a reasonable notice by the party claiming the benefit of the guaranty, informing the party both of the default and the amount.

Douglas et al. vs. Reynolds, 7 Pet. 125.
Lee vs. Dick, 10 Pet. 482. Adams vs Jon

But in this case the findings show that the sureties mad
the plaintiff, asked the condition of the business after it was closed, and were told, if not a falsehood, that which misled both of them into the belief that they were not only discharged, but that there was no default.

We submit, independent of all other considerations as to their legal right to notice of the default, these facts make an estoppel upon the plaintiff by matter *in pais*.

To meet this defense so manifestly just, the plaintiff procured from the referee, upon what testimony this record of course does not disclose, findings to the following effect.

That at the time of making the representations by plaintiff's agent in the spring of 1876, the said agent had "*casually*" looked over the accounts between the plaintiff and C. & B., and it appeared that C. & B., had credits in the shape of notes and *leases* in excess of what they owed, and had the notes turned over to plaintiff and the notes and leases held by them been good and collectable the sum would have exceeded their liabilities—that but a small portion of the indebtedness was due, and it was not known but that the notes were collectable. (9th finding of fact.)

The 12th and 13th findings are to the effect that there is no evidence to show that any change has occurred in the financial condition since the spring of 1876, and I find *no such change has occurred!* That at the commencement of this action none of the notes guaranteed by C. & B., had been due for years, and there *is no evidence of any change in the financial condition of the makers from the time of the notes then taken.*

It is upon these findings that the plaintiff relies to justify misleading the sureties into a false sense of their discharge and a false statement of the facts as to the liability of C. & B. In ths first place the finding is a false one on its face. Under the contract sued on in this case no such things as "leases" were taken, and the finding that C. & B., held notes and *leases* under it, was an anachronism. Leases were taken by C. & B., under the contract made *after* this had been superseded. No such collaterals did or could exist, and such a finding being against the pleading (the contract was part of the complaint) was not only nugatory, but shows the looseness of the referee in regard to the facts But the crowning absurdity of these findings is disclosed, when the referee finds a fact to exist because, as he says, there is no testimony to show the negative of it! The first time we venture to observe when a finding of an affirmative fact tis based on the absence of testimony!

Nowhere is it found that these collaterals held by the plaintiff "in excess," as the referee says, of the indebtedness of C. & B., were not perfectly good. It is found that after suit brought, on "commission account" out of $146.97 alleged to be due, before the trial, the plaintiff had collected from these collaterals $115.75. As the referee finds that "there is no change in the financial condition of the makers of the notes guaranteed by Crockwell & Bassett, and as every man who makes a note is presumed to be solvent, the legal presumption is that all of these were collectable; and yet after crediting C. & B., with these notes in their account, the plaintiff compels their delivery to itself, keeps them in its hands, and without showing any effort to collect them, sues the sureties of C. & B., and still holds on to the collaterals!

When, according to their own account, their debt is paid, by C. & B. being credited with solvent paper, and when C. & B. owes them nothing, they sue both C. & B. and the sureties for a debt already paid.

But to come back to the proposition that the plaintiff is estopped to collect of these sureties in any event by matter *in pais* discharging the sureties. That a surety may be released by matter *in pais*, though his obligation is under seal, will not be disputed.

Canal Co. vs. Ray, 101 U. S. 522.

The second conclusion of law which we combat in this connection is: "That the plaintiff is not estopped or its [right of] action affected by reason of any representation made in this case," etc. (See findings.)

We assert the rule of law to be settled that to induce a party to act so as to prejudice his rights or impair his remedies in a material respect will estop the party doing it to assert his claim.

Hedging against the effect of the representations made to these sureties, and which the referee was compelled to find, we have the last finding of the series called "findings of fact" in these remarkable words:

"George Wilkinson (plaintiff's agent) had no authority from plaintiff, to bind it by any declaration as to the relase of said bonds or either of them (meaning the one sued on in this case, and the one involved in case No. 4197). I find he did not intend to make any statement concerning the release which was untrue, or to deceive or mislead the defendants or any of them, and his statements rather in the nature of assent to, or non-denial of, statements made by C. & B. in his presence. I do not find he had or exercised any such apparent authority as should induce the defendants to rely on his statements concerning the business, or satisfaction of the bond without further inquiry." We remark of this finding of fact, so-called, that every attempt to find or state a fact in it as deduced from proof, is contradicted by other findings much more explicit; and everything in it not a finding of fact is an attempt to state a conclusion of law, under pretence of finding a fact.

Whether the confessed agent of the plaintiff, who was its only direct representative that any of defendants ever dealt with, had "authority to bind" his principal was a question of law, and before that conclusion could be arrived at, *the facts* as to his agency would have to be ascertained. The first sentence of the finding is a conclusion of law and not a fact. The next sentence is an effort to find a fact, viz: That Wilkinson did not intend to deceive or mislead the defendants by his statements to them, or intend to state anything that was not true; and in another

Kahn vs Smelting Co, 107

finding already quoted, the referee says that they "were not false," (2d par. of the 9th finding), and after stating that the plaintiff's agent did not intend to deceive or mislead defendants, the referee again returns to the question of authority, and adds to the former legal conclusion this: "I do not find that he—the agent—exercised any such apparent authority as should induce the defendants to rely on his statements * * without further inquiry,"—and this is called a finding of fact! It is not entitled to the respect due an argument apologizing for the agent's conduct, made by his own attorney. It is a shuffling apology for the infamous conduct of this man Wilkinson, who tells both of these sureties, when he is *enquired of by them* as to the condition of the business, every portion of which he must have understood at the time, that it was not only prosperous and satisfactory, but that as to their liability there was "nothing for them to bother about." This last declaration was made after Murphy had sent for him to come to his place of business, in order to know if the business was settled, and if there was any liability on the bond; and the referee finds that both bondsmen—on inquiry for their own protection—got such answers as induced each to believe that the whole thing was settled honorably and agreeably. To apologize in the form of a finding, which is in direct contradiction of other findings, for a witness who, in the most artful manner misled and deceived these sureties, is a most extraordinary proceeding! The language of the finding, "that his statements were rather in the nature of assent to, or non-denial of, statements made by C. & B. in his presence," at once shows that trick, evasion and deception by one party, may be commended by being specially set forth, in favor of the one that uses it.

We invoke the law on these questions—

"We hold" says Folger, Justice in Continental National Bank vs. National Bank of Com., 50 N. Y., Rep., 583. "that there need not be upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely on it." He adds: "It would limit the rule much within the reason of it, if it was restricted to cases where there was an element of fraudulent purpose." In the original argument of this cause it was urged that there must be a fraudulent purpose in making statements to a party which are relied upon by him, in order to estop. And this extraordinary finding, was made to meet this assumption as to the law.

That the statements were made intelligently, deliberately and wilfully, to mislead both Streeper and Murphy, no one who reads the skeleton of the facts, which the referee has put into the findings, can fail to see;

but it is immaterial. The only question is, were these sureties, deceived and misled by the plaintiff's agents; was his conduct calculated to mislead a reasonably prudent person? The referee finds that they were misled, he finds facts showing that this was by reason of the statement made by the plaintiff's agent—and he also finds such facts (negativing the innocence of the agent which he voluntary asserts, against the facts which he finds) as show that any prudent business man would be likely to be misled by such statements.

We refer to the whole case in the 50th New York Reports as perhaps the best considered of any other. Also the following:

Manufacturers & Traders' Bank vs. Mo. Hazard, 30 N. Y., 226.

Garner vs. Bird, 57 Barb., 290.

Gillespie vs. Carpenter, 25 How. Pr., 203.

Brookman vs. Metcalfe, 34 How. Pr., 429.

3 How., 754.

Gaylad vs. Van Loan, 15 Wend., 311.

People, etc., vs. Bristol, etc., 23 Wend., 228-9.

Mitchell vs. Reed, 9 Cal., 206.

Greenl. Ev., 1, Sec. 208, n. 4.

Par. on Cont., 1 P., 340.

We submit that the judgment of the court below must be reversed.

RHODA MURPHY, *Administratrix, etc.*, APPELLANT,
vs.
VICTOR SEWING MACHINE CO., APPELLEE.

Case File No. 4197.

This, and the preceding case, File No. 4099, were heard together in the lower court, and passed through the same history. The testimony in the two cases was taken together, before the referee who tried them, and by stipulation all the testimony was regarded as taken in both cases so far as applicable. The finding of the receiver was in favor of the plaintiff for the sum of $2000, for which sum the District Court entered a judgment, and for costs. On appeal to the Supreme Court of the Territory the judgment was affirmed by a majority of the court and the case is now for review in this court.

STATEMENT OF THE CASE.

This is an action on a bond and contract between the appellee, The Victor Sewing Machine Company and Crockwell & Bassett, principal defendants, and Edmund H. Murphy and Daniel Grenig as sureties.

The contract in this case instead of being what is called a "consignment contract," as in case No. 4099, is known as a "sale" contract in the nomenclature of this Victor Company.

This contract is the one so often alluded to in the former case as the "new contract" between the plaintiff and Crockwell & Basssett. The contract was made March, 11, 1876, and the bond annexed to it and upon which this suit is planted against the sureties was dated the same day.

Two breaches of the bond are assigned: 1st—The non-payment of certain promissory notes described in the complaint, made by C. & B. to the plaintiff between the date of said contract and bringing of suit; 2d—By the non-payment by C. & B. of certain promissory notes given by purchasers of machines, that were indorsed and guaranteed by C. & B., and which were not paid—except a certain sum, which is deducted from the aggregate—and judgment asked for balance.

The defenses to this action are two-fold—one by the principals going partially to the merits, and also the validity of the contract—the defense by sureties going upon the ground of fraud in procuring the contract and an estoppel *in pais*.

The stipulation applying the evidence to each case as it is applicable, makes the findings in each, when they are applicable, proper in the argument of either.

The formal findings in this case on the question of the procurement of the contract by fraud, are not not as full as in the other, but the latter are equally, under the stipulation, applicable in the examination of this case. We assign the following

ERRORS.

First—The complaint is insufficient, because—

1st—The alleged liability of the sureties being contingent, and collateral to the contract of Crockwell & Bassett with the plaintiff, it was essential to create any liability upon the sureties, that within a reasonable time after the alleged default of the principals, the sureties should have had notice of both the default and the amount for which they were to be held, and the complaint contains no such allegation, but the contrary appears.

2d—The facts found in this case show that the defendant Murphy was entitled to judgment in his favor on two grounds: first, he was entitled to notice of the default of his principals and of the amount for which he was held, while none was given, and by reason of the fact that when he made inquiry of the state of the business he was misled and deceived by the plaintiff's agent.

Second—On the facts found he was released as a surety on the ground that his signature was obtained by a misrepresentation of plaintiff's agent at the time, and that the plaintiff is estopped by its acts and conduct injurious to said Murphy from any right of recovery against him.

ARGUMENT.

To avoid repetition, we refer to the portoin of the brief in the preceding case on the subject of estoppel—the questions being the same and resting on the same facts.

As to the sufficiency of the complaint we rest on the same argument and authorities.

As to procuring the surety to sign the bond by fraud:

The facts are these—In July, 1875, the plaintiff made a "consignment contract" with the principals in this suit and from that time till

about the 1st of March, 1876, did the business with them under that contract—the defendant in this suit as surety, being also a surety on that contract, with the defendant Streeper, in the preceding action.

Streeper notified the plaintiff in February, 1876, by letter (which the referee does *not* give in his findings) and Wilkinson, plaintiff's agent, came to Utah in consequence. The result was a *new* contract in March, 1876, and Streeper and Murphy are both solicited (the referee says in his findings by C. & B., but it was done in the agent's presence) to go upon the new bond.

The referee finds that Streeper did not go upon the new bond. He should have found according to the facts he states, that he refused to do so. Murphy does sign the new bond, but before doing so had an interview with plaintiff's agent, and enquired about the condition of the business—he was told by plaintiff's agent that it was "prosperous," that they "had done well," that the plaintiff was "well pleased' and was giving them "a new contract" by which they would make more money," etc.

That these statements were false, and wilfully made to induce Murphy to go upon the second bond, there is no room for doubt.

The referee adds—that these representations were not false—his conclusions only—and this he neutralizes when he finds that instead of "*doing well*" as the agent said they were, Crockwell & Bassett after three years indulgence were in debt on accounts to the plaintiff prior to the date of this conversation, over three thousand dollars. If Wilkinson had said that if the moneys that the goods had been sold for ~~was~~ were collected, and no losses made, that C. & B. would be able to pay their debts—it would have been the most favorable statement for them, which the facts would have justified.

The statement which Wilkinson did make was a wilful lie, could have been made for no other purpose than to mislead Murphy into signing the new bond. The referee finds that he did it believing that the business was prosperous, and yet we are told that the plaintiff procuring a bond by such means is entitled to exact its penalty!

A more unpardonable misrepresentation to an innocent man was never perpetrated. Think of the pretence, that by the new contract they were to have a larger percentage and make more money—compare this statement with the actual result. In six months' time when they were to have larger profits and make more money; they, with the best of management, as the agent tells Murphy after it is all over, in November, 1876, quit over *four thousand dollars in debt.*

And yet the referee who finds them three thousand dollars in debt,

on the first contract, and four thousand dollars on the second one, finds that the "representations" (that the business was prosperous, under the first contract when it was closed, and would be even better under the new one) "*was not false!*" *While we accept his facts,* his conclusions we must disregard, and so will the court. This case is a precise parallel of the case of the Remington Sewing Company vs. Kezertes, *et. al.*, 49 Wisconsin, 409.

The circumstances of the two cases, as disclosed, are so nearly identical, and the points involved so completely alike, that we submit the case on the authorities cited with the principal case without further argument.

In conclusion, of these cases:

The iniquitous character of the contracts sued on, the neglect of the plaintiff in every stage of the claim against C. & B., while allowing the sureties to be misled, must at once challenge attention.

Justice entitles the plaintiff to nothing as against any of these appellants, and if the strict law has been heretofore misapplied in these cases, we ask that both law and justice shall now be vindicated by a reversal—in each—and both of them.

SUTHERLAND & McBRIDE,
Attorneys for Appellant.

112-676

Office Supreme Court U. S.
FILED.
DEC 11 1884
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1884.

WILLIAM H. STREEPER, and
RHODA MURPHY, Administratrix,
Appellants.
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 950.

RHODA MURPHY, Administratrix,
Appellant,
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 951.

ARGUMENT OF APPELLANTS IN REPLY.

J. G. SUTHERLAND, and
JOHN R. McBRIDE,
Attorneys for Appellants.

Star Steam Print.

To the argument of the counsel for appellee we beg to submit a brief reply:

The first assignment of error to which the argument of appellee is addressed, is as to the sufficiency of the complaint.

We urged that the complaint was vitally defective because, "the two first causes of action are for damages for a failure to pay for goods sold and delivered, and there is no allegation in the complaint of the value of the goods either by the article or in the aggregate."

The answer to this by the counsel is: "That there is but a single cause of action, on the bond, several breaches of which are assigned, and that the non-payment for the goods and of the notes, is only alleged to show breaches of the bond, and the amount of damages. The foundation of the action and without which there can be no cause of action is the undertaking of defendants in the bond."

We submit that if this position be correct, it is not an answer to the objection; and we further submit that the position taken is not sound.

FIRST.

Is the bond in this case the "cause of action?"

An injury to a person's rights which entitles him to a judgment, furnishes a cause of action, within the meaning of the law.

Graham vs. Scripture, 28 How. Pr., 501.

A number of causes of action may arise upon one instrument, or out of a single transaction, and though they may be joined in one action in most cases, they must, under our code, be each complete in itself, and be separately stated.

Haskell vs. Haskell, 54 Cal., 262.

Sharp vs. Miller, 54 Cal., 329.

If the cause of action is solely on the bond in this case, the complaint would set out the bond in terms, or in legal effect, allege non-pay-

ment, and pray judgment for the penalty. The production of the bond would make a *prima facie* case for plaintiff. But that is not this case, as appellee admits.

This is a *bond of indemnity* on an *executory contract*, and while it furnishes the measure of the sureties' liability, it is not the cause of action.

This not a bond for the payment of money only, but an undertaking to secure the obligee against damages which may occur on a collateral matter. It is therefore not a simple action on the undertaking, but a suit based substantively on other facts, wholly independent of the bond, and *to which it is incidental*. Counsel's position that the cause of action is upon the bond, would require him to admit that the obligee could, by setting it out and alleging that it had not been paid, recover judgment for its penalty. While he does not contend for this, and admits that collateral facts must be stated, to entitle the obligee to recover, he, to be logical, should admit that the right to recover *rests on these independent facts*, supplemented by the undertaking in the bond, and that this action is not simply a suit on the latter.

We have already shown in the opening argument for appellants in this case, that in a suit on an indemnity bond, *all the facts constituting a breach of the bond*, must be stated with particularity. (Page 6 of brief and argument, and authorities cited.)

In such a case, the law requires the facts constituting the breach alleged, should be stated with the same particularity, as if the party injured were suing the parties to the transaction which the bond is made to secure. In this case, in order to charge the sureties on the undertaking, the appellee was bound to charge the facts as to the delivery and sale of the goods with as much fullness, as if the action had been on the contract with Crockwell & Bassett alone; and the reason is, that the sureties in the undertaking *only become liable* when all the things had occured, fixing a liability on their principals.

These facts it is true are collateral, but the nature of the liability of the appellants, being contingent, makes them indispensable allegations to the fixing of any liability on these sureties.

While counsel disclaims the necessity for this, it is evident that this is in fact the theory of the complaint. The failure to allege the value of the goods consigned and sold, is a clear violation of the theory of the pleader who drew the complaint. A bare inspection will show this.

The counsel says that if the objection to the two first breaches of the

bond is correct, then the two last breaches referring to the notes are equally defective, and we are reproved for not making it as to all of them.

We reply that this is not argument, but we will relieve the apprehensions of the counsel by saying, that while we believe the objection would have been good to the two last breaches assigned on a special demurrer, they are not so defective as to render them insufficient to support a judgment. The schedule of notes with dates, amounts, etc., and the allegations that they had not been paid are sufficient to sustain a judgment—and hence we did not urge the objection. They are only liable to the objection that they are not separately stated.

It is said (page 2 appellee's brief) that though it was necessary to show by the complaint, for breaches of the bond, that goods had been consigned and not paid for, that "this did not convert the action into one for goods sold and delivered, or require the sale of the goods to be set out with more particularity, than was necessary to show that the condition of the bond had been broken." If we admit this it cannot aid appellee. The Company is suing for damages for a failure to pay for goods sold and delivered. If it was necessary to set out the sale and delivery, how would damages for this be ascertaine and assessed without an allegation of their value? The necessity for this was so apparent that the findings (page 36, folio 72) say "that between July 3, 1875, and February 10, 1876, the plaintiff sold and delivered to Crockwell & Bassett parts of sewing machines *at prices named in the agreement*," when the agreement contains not a word about prices from beginning to end! The necessity for finding value was such, that the plaintiff undertook to make up for the omission of any allegation in the complaint, by putting it into the findings! Of course such a finding is nugatory, but it serves to show the character of the argument by which the plaintiff seeks to escape the objection now.

By alleging the other facts necessary, except the value of the goods the appellee in effect confesses that this was necessary. On the argument now made, the plaintiff in this action might have come into court and on allegations of a breach of each of the conditions of the bond in general terms, to its damage, have had a recovery. Such a pleading would have been so obviously defective as to require no argument; and if it can only recover on a statement of facts covering all the elements of its damages, then the defect in this complaint is equally obvious.

As to the claim that "Exhibit A" is properly a part of the complaint, we only remark that it is only evidence, giving it its greatest effect. It does not profess to supply any allegation not contained in the complaint. It is a mere bill of particulars, and an issue taken and tried on

it, would have been immaterial. We refer to our opening argument in this case, page 7, on this point.

To the additional argument that this is a suit on the bond of the appellants, and not a suit to recover for the value of goods sold and delivered and not paid for we refer the counsel and this Court to the decision of the Supreme Court of Utah, from which we appeal.

That Court said:

"The contract (which is part of the bond) was not and was not intended to be, a consignment of machines and attachments and no indebtedness on the part of Crockwell and Bassett was created by its execution and delivery."

The bond fixed the extent of the sureties liability, but the "cause of action" is based on the collateral acts of the principals.

These acts are the "cause of action," the bond furnishing only the measure of recovery.

SECOND.

The defense of the Statute of Limitations to the first two causes of action.

The counsel contends that the finding that the two first accounts assigned as breaches of the bond, had occurred more than two years before suit brought is immaterial, because he claims the action is on the bond, and not upon the accounts.

As that point has been fully discussed in the former argument and our position amplified in our reply to the last point, we omit notice of it here except to discuss briefly the case cited by counsel under this head.

Dixon vs. Halroyd, 7 Ellis & Black, 903.

The facts of that case are:

A covenant to pay a certain sum of money for the purchase price of real estate, provided for certain payments in cash on the day of its execution, and the remainder at further time specified, by notes given at the time of the contract. The cash was paid, and the notes given but not paid, and the unpaid notes became barred by the statute of limitations. To an action on the contract the defendant pleaded the statute of limitations because the *notes* had become barred. Here was an attempt to substitute—the *incident of the contract*—for the covenant—the principal thing.

In the pending case, the appellee seeks to substitute the bond—a collateral instrument—made to secure the accounts to be created, for the account itself.

The case cited confirms our view of this case. The court refused to permit the principal thing to be treated as the incident. The covenant to be overshadowed by an incident to its performance which stopped short of complete compliance with its requirements. In that case the contract *created the indebtedness sued on at its execution*—in our case the execution of the bond created no liability whatever, and until the accounts were made and not discharged none could ever arise under it. The authority is not only not in harmony with the position of counsel, it is in entire harmony with ours.

THIRD

No breach of the bond to secure the personal and guaranteed notes. Third and fourth breaches of the bond.

In reply to this part of appellee's argument (page 5) we desire to say:

That it does not nullify the purpose of the bond to give it the construction we claim for it.

By looking at the agreement between the Company and Crockwell & Bassett, it will be seen, that the machines until sold were the property of the Company, and while C. & B. were authorized to sell them and receive the price, these proceeds were to be the property of the Company. (Marginal clause, Folio 10, Transcript.) C. & B. had an interest in the proceeds of notes when collected, but they were to be given and endorsed in the meantime so that the Company could use them as ordinary commercial paper. If the machines were sold for cash, the cash was to be remitted, and if for notes, they were to be indorsed and remitted to the Company.

The bond given was to secure the performance of these acts. It would have been an extraordinary contract for the parties to have agreed that the Sewing Machine Company should be *insured* against all possible loss on its own consignments. The construction claimed for this agreement by the counsel, would result in putting the Company in the condition that in no event should a loss occur. If goods were sold for cash, it was its cash, and a failure to pay it over would be embezzlement; (see Folio 10, Transcript) if sold for notes, the company owned the notes which were to be indorsed by C. & B.; if sales were made without either cash or note from the purchaser, C. & B. were to give their own notes and *all collateral security* received by them, and to transmit them; and if the undertaking of the sureties is, that they will pay these notes, then, we have an invention for securing sales that will beat any insurance device yet patented for securing debts. The construction is forced, unrea-

sonable and unjust. It is not drawn from either the letter or purpose of the contract.

By this process of security, if the counsel is correct, the Company would receive all the moneys from sales, all the notes and collaterals taken to secure them on sales made, the indorsement and guaranty of their own agents of these notes in addition, and hold these appellants' bond for the whole indebtedness beside Such an unnatural construction of an ordinary bond violates reason, justice and common sense. There is an artful effort in the bond, by way of recitation, to extend the terms of the agreement beyond its fair meaning, but the attempt to conceal the design from view, has defeated the object. The bond in fact and fairly construed, secures the Company in the faithful performance of the duties of their own agents, it required these agents to account for moneys they received, for all collaterals taken, to give their own notes and gauranty by indorsements, the notes of others. For these things the appellants became sureties. Their obligation neither in letter or spirit went further, and any attempt to impose a further obligation, would be to allow a party appointing an agent to sell his own goods, under pretense of security for the faithfulness of his agent, to procure and absolute insurance upon sales of his own goods, made for his exclusive benefit. The real question is not whether the agreement shall be nullified by construction, as counsel claims we ask, but whether innocent parties undertaking that their neighbors shall act faithfully as agents of a vendor of goods, shall be entrapped, by construction of their obligation, into liabilities which no reasonable man would ever incur, or any just one ever ask.

FOURTH.

The Company's failure to allege notice to the Sureties.

This defect in the appellees' case was urged in the opening argument as one that went to the sufficiency of the complaint. The agreement and bond show that the appellants are sureties for Crockwell & Bassett. The waiver of notice referred to by counsel in the argument, was a waiver of specific notice of each separate breach, as of indorsements and the like, and had no reference to that notice of *liability on the bond generally*, which we claim must be given in every such case.

If notice that the principals were in default was necessary to enable the obligee to recover, as we claim, the authorities cited in our opening argument show, then a failure to demur is no waiver of the defect.

The defect that a pleading does not state facts sufficient to constitute a cause of action, is never waived.

FIFTH.

The first matter in appellees' argument which requires notice, is the claim that the findings by the referee as to the facts which we rely upon, as estopping any recovery on behalf of the appellee, are outside of the case, and therefore to be disregarded. These facts are in 8th, 9th and 10th findings of fact, pp. 37-8 of the Transcript.

The defense was (page 28 Trans.) that about the 28th of March, 1876, the Company applied to Murphy, one of the appellants, to become a surety on a new contract between the original parties to this one, and that its agent, to procure said Murphy to become such surety, assured him that the prior business was settled, and induced him to become such surety when the facts, as now alleged, were otherwise. That he made like representations to defendant Streeper, to induce him to become a surety, etc. (we condense the allegation.) The answer also alleges that a settlement actually did take place as represented.

The finding is in response to those averments and however faulty it may be, it is clearly on distinct issues, which to have ignored, would have been error of itself.

They show that an examination of the business had taken place by the agent. They show (pp. 37-8 Trans.) that after such examination the the old contract—now in suit—was abrogated and a new one entered into, that the agent informed both Streeper and Murphy that the business had been satisfactory, and that the Company "was giving C. & B. a new contract with a larger percentage, which would enable them to make more money."

They also show that in November, 1876, the same agent *being sent for by Murphy*, who was surety, on both old and new contracts, told him that the business had been turned over to another party, and that "everything was satisfactory," and "the bondsmen had nothing further to bother about." (Folio 76 Trans.) The referee finds that "both of the appellants got the impression from these statements" that everything was settled and that they were released.

But these findings of fact are attempted to be qualified by certain opinions of the referee as to their legal effect. He says that in fact no settlement had been made, on either occasion, and he also says that the representation that it had been made *was not false!* He says that a representation that the business under the old contract was satisfactory was

not a falsehood, although he finds that Crockwell & Bassett was in default thereon in the sum of thousands of dollars, which are now sued for. He finds that a statement that the old contract "was satiafactory" and that under the new one the parties were "going to do a larger business and make more money," was not a representation that they had been making money, when they had lost thousands! Such qualifications of a finding of fact, are absurd. They are only to be accounted for by *the actual fact that they were drawn by the counsel of the company*, who sought to break the force of the facts found by conclusions utterly at variance with their tenor, and finally this to escape them by saying the real facts are immaterial anyhow.

The vital facts remain, that the agent wilfully misstated the truth when he told Murphy and Streeper that the business had been satisfactory. He wilfully falsified when he assured Streeper at the same time, that he was no longer liable. Streeper's question was direct, "am I *relieved* on the bond? and he "made such an answer that Streeper understood he was." When he denies this, the referee finds the fact first, and then seeks to apologize for the agent by saying that he (the referee) don't think the agent *intended* to mislead! and finally finds as a fact, that "he had no authority, or such apparent authority, as to justify the appellants *on relying on anything he might say!*" Such are the devices resorted to rob these unwary confiding sureties. Thrown off their guard, misled, wilfully, cunningly, and completely, and the man who does all this is apologized for as doing it all with no evil intention; and at the end had no "authority" to mislead—no power of attorney, we suppose, formally authorizing him to cheat, swindle and defraud, and ratifying and conforming the same.

The circumstances were important. They occurred in each case after the business had been examined by the agent, "casually looked over," says the referee, in the apology he makes for the falsifying agent," but the "casual" looking over, seems to have been followed by an entire change of the existing contract, on each occasion. They were made when the duty of the agent was both to know and speak the truth. That he knew the truth, we beleive; that he spoke falsely, we know, but whether wilfully false or not, the parties were misled and prejudiced, and that is sufficient for the defense The appellee's agent was bound to tell the truth, or not speak. He was relied upon by these parties who had a right to rest on his statements, and the answer we get from appellee's counsel is that the truth is immaterial. And we ought to congratulate ourselves that the party seeking to rob these appellants, waited for nearly four years before

beginning the performance. The matters in the eighth and ninth findings, which the appelee's counsel relies upon, as negativing the defense of the sureties are *not matters of fact*, but *inferences*, totally at variance with the facts found, interjected into the findings improperly, and in the manner already stated.

The twelfth and thirteenth findings are in the same condition. The spirit in which they are made shows the value of them. We refer to the original argument on these findings.

To the criticism of counsel on the facts of the case cited by us from 64th N. Y., 316, we need not reply. We cited that case for its clear precise statement of law generally, and we show thar the facts of our case come within the rule of estoppel there laid down. Further comment on this point is unnecessary.

The last point in appellee's argument is on the closing finding of fact relating to the authority of the agent Wilkinson.

The findings disclose what the facts were. That Wilkinsou was the general traveling agent of the Company. That he was the only one who ever appeared in the business, that he negotiated the contracts, paid visits of examination, changed the business, abrogated old contracts, prepared new ones, finally closed up the entire business in his last visit in November, 1876, and with the simple exception, that he did not formally execute papers under seal, exercised absolute control over the whole business. To draw from those facts the conclusion that he had no authority, or apparent authority, to bind his principal by his representations and acts in this case, is too absurd for toleration. It is not a finding of any fact. It is an attempt to neutralize the inevitable conclusion, resulting from facts found.

It is the usual device of those acting by agents, who have indiscreetly admitted the truth to their prejudice, and should be treated accordingly. When an agent has, and exercises the power to institute and close up an entire business, and take it out of existing hands, and turn it over to other persons, a quibble about the want of authority to close up the details of it, can hardly be dignified with the character of argument.

No. 951.

RHODA MURPHY, Administratrix,
Appellant,

vs.

VICTOR SEWING MACHINE CO.,
Appellee.

A few words in reply to the appellant's argument in this case:

The facts relied upon by way of estoppel *in pais*, in the case No. 950, are relied upon to sustain the defense set up in this action.

We repeat the remark, of the opening argument that by the stipulation, the evidence in each case was made evidence in the other, so far as applicable, and the findings of fact in each case are applicable to the other when the issue so makes them. (Trans., pages 18 and 19.)

It will therefore be seen, taking all the findings in both cases together, that Murphy did become a surety, on the instrument declared upon in this case, by reason of the misrepresentations of the appellee's agents.

Had he known the facts, as it is now alleged they were, and he asked for information of the only one who should have known, and whose duty it was to make a truthful statement, it is as certain as the existence of the sun, he would never have signed the second bond, now sued on. We excepted to the sufficiency of the findings in this record when they were made. Such a finding for instance as the sixth (page 13, Transcript), "that the *material part of the representations* set forth in the answer, were not relied upon by Murphy," is not a finding on the issue tendered. It is not a finding of the *facts*, but a mere a conclusion, which the facts disclosed, and does not warrant.

Kahn vs. Smelting Co., 106 U. S., 647.

The seventh (numbered six by mistake) is equally objectionable. It finds that Wilkinson "had no authority," without stating what his authority was, and the other facts found show, that this conclusion of law had no basis to rest upon. There is no pretense that the authority of Wilkinson was limited by the evidence. The ultimate facts as to his authority, should have been set out. The truth is that the facts found, as

to the course of business, and the conduct of the agent, are utterly at variance with this conclusion or inference, stuffed improperly into the finding, and to which objection was made to at the time. (See exceptions to finding, pages 15 and 16 of transcript.)

We again call special attention to the case of Remington Sewing Machine Co., vs. Kezertes, 49 Wis. Rep., 409.

The cases are so nearly identical in all their principle features, that the authority of that case is conclusion of this one, and counsel for the appellee does not controvert the correctness of the law of that case.

Respectfully submitted,

J. G. SUTHERLAND,

J. R. McBRIDE

112-676

Office Supreme Court U. S.
FILED.
DEC 12 1884
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1884.

WILLIAM H. STREEPER, and
RHODA MURPHY, Administratrix,
Appellants.
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 950.

RHODA MURPHY, Administratrix,
Appellant,
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 951.

BRIEF AND ARGUMENT FOR APPELLEE.

CHARLES W. BENNETT,
Attorney for Appellee.

J. G. SUTHERLAND, and
JOHN R. McBRIDE,
Attorneys for Appellants.

Star Steam Print.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1884.

WILLIAM H. STREEPER and
RHODA MURPHY, Executrix,
Appellants,
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 950.

BRIEF AND ARGUMENT FOR APPELLEE.

By stipulation, this case and No. 951, between substantially the same parties, are submitted on printed briefs and arguments.

Case No. 951, so far as it differs from this, will be noticed after considering this case.

We have no printed record, and are deprived of the convenience of referring to its pages, but the assignments of error are such as to lead to no great inconvenience to the court. Assignments of Error Tr. p. 30

Appellants make five general assignments of error which are taken up in their order.

I.

Insufficiency of the complaint to support the judgment in the several respects noted in the subdivisions.

First. "That the two first causes of action are for damages for a failure to pay for goods sold and delivered, and there is no allegation of value by the article or in the aggregate."

This specification puts forth a view of the action which has led to a radical difference in views respecting it. Appellants contend, in effect, that the complaint sets out several causes of action, the two first of which are for goods sold and delivered. The appellee contends there is but a single cause of action on the bond, several breaches of which, are assigned; and that the non-payment for the goods, and of the notes, are alleged only to show breaches of the bond, and the amount of damages. The foundation of the action, and without which there can be no cause of action, is the undertaking of the defendants by the bond. An action might have been maintained against Crockwell & Bassett, on the agreement the performance of which the bond secures, but no action can be maintained against the appellants, or against the appellants and Crockwell & Bassett jointly, except on this bond. The agreement for the sale and consignment of the goods was executory, and to show breaches of the bond it was necessary to set out that goods had been consigned, sold and not paid for, and the amount of the default, but this did not convert the action into one for goods sold and delivered, or require the sale of the goods to be set out with more particularity than was necessary to show the conditions of the bond were broken. This difference in pleading is more clearly illustrated by the assignments of breaches for the non-payment of notes made by Crockwell & Bassett, and of notes guaranteed by them, and to the pleading in these respects no objection seems to be taken. If the first two counts are for goods sold, why are not the last two on notes made and notes guaranteed by Crockwell & Bassett? Under the Utah practice, each note made or guaranteed by Crockwell & Bassett is a separate contract, and must be set up in a separate count or cause of action, if the action is brought on the notes. But in this case the plaintiff counted on the bond, showed that Crockwell & Bassett had sold machines consigned to them and given their own, or guaranteed the buyers notes, and the notes were shown only by list in an exhibit. So in assigning the first two breaches it was only necessary to show the nature and extent of the breaches. In this respect the complaint, after reciting the 5th article of the agreement, alleges in substance that between certain dates, under said agreement and at the request of Crockwell & Bassett, plaintiff consigned to them "divers sewing machines," which were sold by Crockwell & Bassett prior to 1878, and that they had failed and refused to pay the plaintiff the proceeds of said sales, or so much as the plaintiff was entitled to,

to plaintiffs damage of $145.82, and that the aggregate amount the said Crockwell & Bassett so failed to pay was $146,82. Had the complaint stopped here, the allegation of the breach would have been quite general, but in the absence of a demurrer, or any demand of an account or bill of particulars, and after judgment, it is claimed the allegation would support the judgment on this breach. The defendants were informed that Sewing Machines were consigned under the agreement, and sold; and that Crockwell & Bassett had failed to pay $146.82, proceeds of sale to which the plaintiff was entitled.

The complaint, however, proceeds to make the account annexed and marked exhibit "A" a part thereof, and refers to it as a detailed and itemized account, showing the machines received and sold, the credits, and amounts due and not remitted. A reference to exhibit "A," will show it is a complete detailed history of the entire dealings, (except on the attachment account) in which everything is charged, all credits given including the notes given and those guaranteed by Crockwell & Bassett which are credited in full, and also including commissions. No reason is known why this statement is not properly a part of the complaint. The answer shows the defendants had full knowledge of the matters assigned as a breach, and it admits exhibit "A," except as to five per cent. which they claim they remitted and for which they were not credited.

The objections to the allegations of the second breach, are the same as to the first, and the same remarks apply.

Second. The second specification under the first assignment of error, is in substance, repeated in the second assignment, and will be there noticed.

Third. The third specification under the first assignment of error is repeated in substance in the third assignment and will be there noticed.

II.

The second assignment of error is that, on the facts found, defendants should have had judgment, because:

First. "The first and second causes of action were barred by the Statute of limitations."

The complaint alleges the consignments, on what we call the two first breaches, were made between July 3d, 1875, and February 10th, 1876. It would require an examination of exhibits A. and B. to show when the balance became due after sales, and probably two years had not elapsed before suit. This is not considered material, as it is believed the

statute of limitation, of two years, can in no case apply. The complaint was filed June 12th, 1879, and by the Utah Statute the filing of the complaint is the commencement of the action, so far as to stop the running of the statute.

The limitation act of Utah, on an open current mutual account, is two years from the last item on either side, and on an agreement in writing, four years from the time the action accrues.

It is conceded that, if the indebtedness was barred, no action could have been maintained against Crockwell & Bassett, and that the non-payment of the barred indebtedness could not be assigned as a breach of the bond, against any of the defendants. We have already claimed that the action is not for goods sold, but is an action on the bond, and if this is correct it follows that the two years limitation is inapplicable. It is evident the sureties could not be sued, except on the bond. It is also claimed that Crockwell & Bassett could not have been sued except upon the bond or the *written agreement*. The latter was executory and fixed all the terms and conditions upon which future dealings should proceed. It is alleged, not denied, and found by the referee, that the dealings were under this agreement. Had the plaintiff sued Crockwell & Bassett, for goods sold and delivered, and upon an implied promise to pay the reasonable worth, the production of the written agreement would have defeated the action, or, at least, the recovery must have been in accordance with its terms. The law implies a promise to pay the reasonable worth, only from a consideration and in the absence of an express promise, and when there is an express agreement to pay a fixed price, there is no room for an implied promise. Except as to the parts of Machines, (called the attachment account) it was not a contract for the sale and delivery of goods, but a contract for consignment, and an accounting after sale, on commission, the agent guaranteeing the sales, and in substance a *del credere* commission. The fact that the contract was executory could not, it is conceived, change the nature of the contract under which they were shipped. We suppose that if a note and mortgage were taken to secure future advances, the advances would not be deemed money loaned on an oral contract, or under an implied promise to re-pay, so as to bar the action in two years, yet in an action on such instruments parol proof would, perhaps, be required to show the dates and the amount of the advances. Different instruments, for the same obligation, may exist, and the action be brought on either.

Dixon vs. Holdroyd, 7th Ellis (C. B.) 903.

Second. "Because no breach of the bond, on the part of the sureties, was found as to either of the other grounds of action alleged."

This specification of error relates to the third and fourth breaches assigned in the complaint, which are for the non-payment of personal notes of Crockwell & Bassett, and of notes of the vendees of the machines, guaranteed by Crockwell & Bassett, and it has been and is claimed, by appellants:

That the bond only secures the agreement. That the agreement only provides that Crockwell & Bassett shall *give* their own notes and *guarantee* those of the vendees of the machines, and does not provide that Crockwell & Bassett shall *pay* either class of notes.

That having *given* and *guaranteed* the notes, the condition of the bond is performed as to the sureties.

It will be seen by the agreement that notes of both classes might be given, and the endorsement or guarantee of customers' notes, was a guaranty of payment. By exhibit "A." to the complaint it appears the course of dealing was to credit Crockwell & Bassett, in the general account, with these notes, and thereafter their liability as to so much of the indebtedness was on the paper given or guaranteed.

If it was true the bond, in terms only secured performance of the agreement, it is denied it could have so limited a construction. It is not denied that a sureties obligation is strictly construed, but it is not so construed as to defeat the intent of the parties and nullify its whole purpose. The plaintiff, by the agreement, had the credit of Crockwell & Bassett, and it would be an idle ceremony to take a bond only requiring them to give their own notes, and guaranty those they took on sales. The agreement to give and guaranty notes was in effect an agreement to pay the notes at the expiration of the credit. This subject was considered in the case, previously cited.

Dixon vs. Holdroyd, 7th Ellis, (C. B.) 903.

The bond, however, not only secures the agreement in its terms but in its true spirit and meaning. The condition is that Crockwell & Bassett shall pay, "All monies due or which shall become due said Victor Sewing Machine Company, under or pursuant to the within contract, or which shall arise therefrom, whether by book accounts, notes, renewals or extensions of notes or accounts, acceptances, endorsements, or otherwise, hereby waiving presentment for payment, notice of non-payment, protest, or notice of protest and diligence upon all notes now or hereafter executed, endorsed, transferred, guaranteed or assigned," &c. Tr. p. 5.

In view of this condition we deem further remarks unnecessary, on this point.

III.

The third assignment of errors, specifies error in two particulars:

First. "No liability is shown, if any breach occurred, because the sureties had no notice."

It is argued, under this specification, that appellants were entitled to notice of the default before suit.

We do not find, from the record in the Supreme Court of the Territory, that this point has ever before been made by exception to findings or assignments of error, unless it is deemed included in some general assignment or exception, without specification; and in the absence of a demurrer, and after judgment, it is urged that it should now be disregarded, and especially as there is no claim or finding that the defendants have been prejudiced by the omission of notice. The findings do not show whether or not notice was given to appellants, but it is found there has been no change in the financial condition of Crockwell & Bassett, or the makers of the guaranteed notes, and therefore no prejudice could result to the appellants, if notice was in fact omitted. If the omission to allege notice was material, the defect appeared on the face of the complaint and should have been raised by demurrer, but the defendants answered and the trial proceeded on the merits.

No notice was necessary. As to the plaintiff, the bond is the joint and several obligation of all the parties, in which all are principals. The bond, in its terms, has no sureties. As between the defendants themselves they were principals and sureties, but as to the plaintiff it is an original absolute undertaking, and not a conditional undertaking like an endorsement or guaranty of collection.

Baylies on Sureties, p 205.
McMillan vs. Bulls Head Bank, 32d Ind. 11.
Harris vs. Newell, 42 Wis. 687.
Central Savings Bank vs. Shine, 48 Mo. 456.
Buchannon Co., vs. Kirtley, 42d Mo. 534.
A. & P. Tel Co., vs. Barnes, 64 N. Y. 385.
McKenzie vs. Ward' 58 N. Y. 541

Notice is expressly waived in the bond. The condition relates to all monies to become due arising out of the contract and on *book account, notes, &c.*, or otherwise, and in the same clause all the obligors expressly

waive notice of non-payment, and diligence, and stipulate for a default absolute on non-performance by Crockwell & Bassett, and without any further condition whatever. This waiver of notice is not limited to notice to the makers or guarantors, for it is in the bond, and the appellants were not parties to the notes or accounts, and as to them the waiver can only apply to notice of default.

Second. "The plaintiff was estopped by its acts and conduct, from any recovery against the sureties."

The specification of error is in substance repeated in the fourth assignment of errors, and will be there noticed.

In this connection, however, the appellants, in their argument, pages 14 and 15, comment on the fact that the plaintiff, in assigning the first breach in the complaint, claims an indebtedness of $146.82 while the sum found due, under this assignment, at the time of trial, is a less amount, and it seems to be argued that the plaintiff was permitted to recover on some new or substituted agreement, made after the commencement of the action. The third finding of fact explains this fully. At the time of the commencement of the action, the balance was the sum alleged in the complaint. Pending the action plaintiff received some small sums from collaterals, credited the defendants, and took a finding for the amount then due. It is difficult to see why the defendants were prejudiced by this, or that it implies any new or substituted contract.

IV.

The fourth assignment of error is that the facts found constitute an estoppel.

The appellants refer to the findings of facts 9th to 14th inclusive.

The appellants, by answer, set up that when Murphy was asked to sign a second bond, he refused, unless the dealings under the first bond were settled.

That a settlement of the prior dealings was in fact made, and the balance satisfied and discharged by negotiable paper constructively delivered. That plaintiff to procure Murphy's signature to a second bond represented to him that prior dealings were settled and the accounts and bond discharged, and relying on these statements he signed another bond. Also that the same statements were made to appellant Streeper.

It is further alleged that Crockwell & Bassett were then solvent, and the appellants relying on the statements of plaintiff, omitted to get security,

which they could have done had they known the truth, and that Crockwell & Bassett have since become insolvent. Tr. pp. 28 + 29.

Some dates are here convenient. The first bond (the one in suit) is dated the 3d day of July, 1875, and is on the back of the agreement. The second bond, (in suit in case No. 951) is dated March 11th, 1876, and in November, 1876, the dealings between the parties ceased and the business was transferred to other agents. The appellant Streeper did not sign the second bond, and as to him the defense rests on proof of an actual settlement of prior dealings, or proof that by false representations he was misled to his damage in respect to an obligation previously incurred.

The defense set up for the appellant Murphy is the same, with the additional allegation that he signed the second bond and thus changed his condition relying on false representations.

The findings cover and negative all these points of defense.

The eighth finding of fact specifically negatives the fact of settlement or of any satisfaction of the demands against Crockwell & Bassett.

The ninth finding of fact shows what occurred with Murphy when he signed the second bond, and it negatives every point of Murphy's answer in respect to statements at that time. It finds it is not true that it was stated to him that either an accounting, a settlement, or a satisfaction in respect to prior dealings had taken place; or that there was any statement relating to his discharge. The only inquiry made was in regard to the past business, and the object of the new bond, and the agent gave, in good faith, such information as he had concerning their business. The new bond, in case No. 951, secured an agreement for sale instead of an agency, and gave larger commissions It can not be claimed that the facts found are sufficient to constitute an estoppel.

The tenth finding sets out what occurred with Murphy in November, 1876, when all dealings had ceased, except such as were required to close up old business.

The appellee contends this finding is outside the issues and should be disregarded. The eighth and ninth findings negative his entire defense, as set up in the answer, and the finding goes to an entirely different time and different circumstances.

A finding outside of the issue is useless and no judgment can be rendered thereon.

Morehout et. al. vs. Barron, 42d Cal. 591.
Moss vs. Shear, 30 Cal. 472.

Giving full effect to this finding, it constitutes no defense by estoppel or otherwise. At the time the conversation occurred Murphy's liability on both bonds had been incurred. No contract was being negotiated, and the agent was doing nothing in the business or in relation to prior dealings. He was in Salt Lake merely to turn the business over to other parties. The statements were not only non-contractual but there was no *res gestæ* of which the conversation could be a part.

The circumstances of the conversation are important. Murphy was bound to know the business was of such a nature that it could not be closed when consignments ceased, otherwise than by notes or guaranteed notes on which Crockwell & Bassett would remain liable. Crockwell & Bassett were Murphy's neighbors and the plaintiffs place of business was in Chicago, and the inquiry was of a man who had no authority and purported to exercise no authority respecting the agreements, bonds or the financial transactions. He made the inquiry in the presence of Crockwell & Bassett, and the answers he got did not assert any settlement, satisfaction or discharge, but merely said the boys had done well and everything was satisfactory. If Murphy got the impression he was discharged, it was a mental conclusion not warranted by anything that occurred.

In respect to Streeper the 11th finding sets up the facts, and that the agent said Streeper had nothing to fear. The 14th finding explains this further. As Streeper did not sign the second bond, this is insufficient to create an estoppel.

The 12th and 13th findings, it is submitted, dispose of the question of estoppel. They negative the idea of any change in the financial condition of Crockwell & Bassett or the makers of the guaranteed notes. The definition of an estoppel requires a party shall be misled *to his damage*, and when delay is asserted it must be supported by proof of damage. The appellants allege damage by reason of a change in the financial condition of Crockwell & Bassett, but failed to prove it.

The case of *The Continental National Bank vs. The National Bank of the Commonwealth*, 50 N. Y. 575, cited by appellants, affirms the most extreme doctrine, but it differs materially from this case. There the takers of the forged check had given for it gold checks and certificates, a few minutes before getting a report that defendants teller pronounced the check genuine, and the only defense was that the taker of the check, by the false statement, was delayed and damaged by the omission of efforts

to recover his checks and certificates. It appeared the forger was delayed at the bank some fifteen minutes, in realizing on his checks and certificates. The facts found by the jury are detailed in the opinion, page 586, and are in effect: That the taker had refrained from acting, relying on the tellers statement.

That had he known the truth he would have acted, and taken measures which would have prevented the whole or some part of the injury. These facts were vital to the case and to a recovery. It was not left to conjecture whether the taker would have acted, or with probable success, but the facts were established by verdict. The case holds that delay which effects legal damage, not speculative but found, create an estoppel. This view of the case appears from *White vs. Continental National Bank*, 64th N. Y. 316, in which the case in the 50th is commented on the opinion.

Here there is no finding that the appellants would have acted, or acted to any effect, but the whole matter is speculative, and in the 64th N. Y. supra, the court say estoppels cannot be based on mere speculation. Instead of an affirmative finding on these issues, or even of silence which would create speculation, there is in effect a finding that no action by the appellants would have resulted differently before suit, than it would after suit, for no change in the financial condition of Crockwell & Bassett had occurred.

It is also claimed by appellee that the 14th finding of facts is fatal to any claim of estoppel. The appellants would not be justified in relying or acting on any declaration not made by the actual or apparent authority of the plaintiff. If the plaintiff was seeking to enforce a contract procured by false representations, it would be difficult to repudiate the agencies by which the contract was obtained. But as to these statements made in November, 1876, and to Streeper in March, 1876, they were non-contractual statements, and, as before said, there was no *res gestæ*. The 14th finding expressly negatives any agency in fact, respecting the subjects of the declarations. It also finds there was no apparent authority, and that he had not so acted in respect to these matters as to induec the appellants to believe he had any such authority. The findings in case No. 951, on this point, are more specific, but in the absence of the evidence, or any request to make the findiag more definite, the presumption must be that the evidence fully warranted the conclusion. Even without the evidence, sufficient appears in the record to show the finding is correct. The agreement on its face shows that Wilkinson, the agent, did not claim the power to make, but only to negotiate contracts. He signs only as a witness, and

the contract after negotiation, had to go to Chicago and there be signed by the manager, Riggs. The first clause of the contract shows the bond must be satisfactory to the company, and not to Wilkinson. Wilkinson did not have possession of the bond or agreement, or of any of the notes or obligations of any of the parties defendant, had never made any collections, or in any wise meddled with the financial transactions. He had, as appears in the findings, negotiated a second contract and bond, in March 1876, and in the fall of 1876, as the agent of the company, come to Utah and turned over the business to other agents. He had never dealt with Murphy or Streeper, or to their knowledge, in a way to justify them in believing he could by his word discharge them, or that he had any authority in the matter of their discharge. When Murphy and Streeper talked with him, they did so as with any person whom they might suppose would have information, and in the same way as they might have inquired of Crockwell & Bassett concerning the business, and from what the latter would say they might get "the impression" they were released, but such impression would be immaterial in the case.

V.

The fifth assignment of errors is to the effect that the findings of fact do not support the conclusions of law.

It is submitted that the conclusions of law are not only supported by the facts found, but necessarily follow from those facts.

RHODA MURPHY, Administratrix,
Appellant,
vs.
VICTOR SEWING MACHINE CO.,
Appellee.
No. 951.

This case was tried with No. 950, *supra*, but the issues are quite different.

The complaint is on a bond securing a contract for the sale of goods, instead of a consignment for sale as in case No. 950. Tr. p. 2.

Complaint assigns two breaches of the bond: Tr. p. 3.